Supreme Court, U.S.
FILED
NOV 5 1997
CLERK

No. 96-1469

In The

Supreme Court of the United States

October Term, 1997

UNITED STATES OF AMERICA,

Petitioner,

v.

HERNAN RAMIREZ,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR HERNAN RAMIREZ

MICHAEL R. LEVINE
Counsel of Record
Assistant Federal Public Defender
101 S.W. Main Street, Suite 1700
Portland, Oregon 97204
(503) 326-2123

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

ISSUE PRESENTED

In assessing the reasonableness of the officers' decision to make an unannounced entry into a family residence at night by breaking the garage window and by thrusting a firearm inside, must the reviewing court only look to the officers' perceived interest in their safety, or should the court utilize a traditional Fourth Amendment balancing analysis and weigh the need for the governmental intrusion against the occupants' privacy and their interests in safety and preservation of their property?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

A. The Facts Surrounding The Breaking..... 1

B. The Decision Of The District Court Suppressing The Firearms..... 4

C. The Decision Of The Court Of Appeals Affirming The District Court..... 5

SUMMARY OF ARGUMENT 7

ARGUMENT..... 11

I. THE DISTRICT COURT AND COURT OF APPEALS PROPERLY APPLIED THE TOTALITY OF CIRCUMSTANCES TEST AND PROPERLY WEIGHED THE FACTOR OF DAMAGE TO PROPERTY IN DETERMINING THAT THE OFFICERS VIOLATED 18 U.S.C. § 3109 AND THE FOURTH AMENDMENT BY BREAKING THE GARAGE WINDOW AND THRUSTING A FIREARM INSIDE WITHOUT FIRST ANNOUNCING THEIR IDENTITY AND PURPOSE AND WITHOUT BEING REFUSED ADMITTANCE..... 11

A. The Court Of Appeals Properly Considered And Weighed Damage To Property As A Factor Among The Totality Of Circumstances... 12

1. In Evaluating The Reasonableness Of The Decision To Make An Unannounced Entry, The Courts Do Not Look Only To Officer Safety But Also To The Occupants' Safety And The Preservation Of Their Privacy And Property 16

TABLE OF CONTENTS – Continued

Page

a) A Fundamental Purpose Of The Knock-And-Announce Rule Is To Prevent Damage To Property..... 17

b) Damage To Property Directly Bears On Officer Safety..... 19

c) The Negative Experience With The No-Knock Law Of 1970 Confirms That Damage To Property Directly Affects Officer Safety 21

d) Violation Of The Knock-And-Announce Rule Continues To Endanger, Rather Than Protect, Law Enforcement Officers And Civilians..... 23

2. The Court Of Appeals Properly Requires More Evidence Of Danger To Justify Damage To Property 27

3. Damage To Property Bears On The Decision Whether To Make An Unannounced Entry As Well As The Manner Of Entry 30

4. The Courts Should Not Defer To The Officers' Decision As To How Entry Should Be Made, Particularly Where No New Facts Developed At The Scene 31

5. The Court Properly Required A Showing Of Specific Evidence Of Danger To The Officers..... 34

6. The Approach Of The Ninth Circuit Does Not Increase The Risk Of Harm To The Police Or Unduly Burden Law Enforcement 35

TABLE OF CONTENTS -- Continued

Page

7. Breaking And Gunporting The Window Is Not "*De Minimis*" 36

B. Even If The Courts Below Wrongly Considered Property Damage, Their Result Should Be Affirmed Because There Was Insufficient Evidence That Shelby Was On The Premises Or That He Posed An Imminent Threat To The Forty-Five Armed Agents 37

C. The Needless Destruction Of Property Constituted A Violation Of Section 3109 And The Fourth Amendment 40

II. THE RESULT BELOW SHOULD BE AFFIRMED ON THE GROUND THAT THE KNOCK-AND-ANNOUNCE REQUIREMENT CONTAINED IN SECTION 3109 IS MORE RESTRICTIVE THAN THAT EMBODIED IN THE FOURTH AMENDMENT 41

A. Section 3109 Contains No Exception For Officer Safety 41

1. Section 3109 Explicitly Sets Forth Several Exceptions, But None For Officer Safety ... 41

2. The Legislative History Of Section 3109 Supports The Conclusion That No Officer-Safety Exception Exists 43

3. Congress Has Enacted And Repealed A "No-Knock" Law, Showing That, Had Congress Wanted To Legislate An Exception For Officer Safety, It Knew How To Do So 44

TABLE OF CONTENTS – Continued

Page

4. The Common Law At The Time Of The Framing, Which The Statute Incorporates, Contained No Exception For Officer Safety 45

5. Congress Determined That Strict Compliance With The Statute Best Promotes The Safety Of The Officers And The Occupants 47

6. The Circuit Courts Have Erroneously Rewritten The Statute 47

B. Even If Section 3109 Contains An Exception For Officer Safety, The Exception Should Only Apply When The Officers Have A Reasonable Belief That Compliance With The Knock-And-Announce Rule Presents An "Imminent" Danger To Their Safety 48

III. THE RESULT BELOW SHOULD BE AFFIRMED BECAUSE THE MAGISTRATE HAD NO AUTHORITY TO ISSUE A NO-KNOCK WARRANT, AND, THEREFORE, THE WARRANT WAS VOID *AB INITIO* 49

CONCLUSION 50

TABLE OF AUTHORITIES

Page

SUPREME COURT CASES

Almeida-Sanchez v. United States, 413 U.S. 266 (1973) 16

American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) 42

Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564 (1985) 39

Arizona v. Hicks, 480 U.S. 321 (1987) 36

Badaracco v. Commissioner of Internal Revenue, 464 U.S. 386 (1984) 47

Bell v. New Jersey, 461 U.S. 773 (1983) 45

Bifulco v. United States, 447 U.S. 381 (1980) 47, 48

Boyd v. United States, 116 U.S. 616 (1886) 37

Camara v. Municipal Court, 387 U.S. 523 (1967) 12

Connecticut National Bank v. Germain, 503 U.S. 249 (1992) 47

Dalia v. United States, 441 U.S. 238 (1979) 33

Darby v. Cisneros, 509 U.S. 137 (1993) 43

Delaware v. Prowse, 440 U.S. 648 (1979) 12

Gomez v. United States, 490 U.S. 858 (1989) 49

Gozlon-Peretz v. United States, 498 U.S. 395 (1991) 44

Graham v. Connor, 490 U.S. 386 (1989) 13, 30, 32

Johnson v. United States, 333 U.S. 10 (1948) 32

Jones v. United States, 357 U.S. 493 (1958) 37

TABLE OF AUTHORITIES – Continued

Page

Jones v. United States, 362 U.S. 257 (1960), *overruled on other grounds, United States v. Salvucci*, 448 U.S. 83 (1980) 12

Ker v. California, 374 U.S. 23 (1963) ...14, 15, 20, 45, 49

Lindh v. Murphy, 117 S. Ct. 2059 (1997) 43

Maryland v. Buie, 494 U.S. 325 (1990) 34

Maryland v. Wilson, 117 S. Ct. 882 (1996) 13

McDonald v. United States, 335 U.S. 451 (1948) 20

Miller v. United States, 357 U.S. 301 (1958) ..... *passim*

Minnesota v. Dickerson, 508 U.S. 366 (1993) ...11, 29, 36

Morse v. Republican Party of Virginia, 116 S. Ct. 1186 (1996) 48

Ohio v. Robinette, 117 S. Ct. 417 (1996) 13

Ornelas v. United States, 116 S. Ct. 1657 (1996) 39

Richards v. Wisconsin, 117 S. Ct. 1416 (1997) ..... *passim*

Sabbath v. United States, 391 U.S. 585 (1968) ..... *passim*

Schenck v. Pro-Choice Network of Western New York, 117 S. Ct. 855 (1997) 41

Smith v. Phillips, 455 U.S. 209 (1982) 41

Soldal v. Cook County, 506 U.S. 56 (1992) 26

Steagald v. United States, 451 U.S. 204 (1981) 32, 38

Tennessee v. Garner, 471 U.S. 1 (1985) 12, 30

Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978) 43, 48

Terry v. Ohio, 392 U.S. 1 (1968) 12, 29, 33, 34

TABLE OF AUTHORITIES – Continued

Page

United States v. James, 478 U.S. 597 (1986) 42

United States v. Karo, 468 U.S. 705 (1984) 36

United States v. Lefkowitz, 285 U.S. 452 (1932) 32

United States v. Ron Pair Enterprises, 489 U.S. 235 (1989) 42

United States v. United States District Court, 407 U.S. 297 (1972) 7, 11

Vernonia School District 47J v. Acton, 115 S. Ct. 2386 (1995) 46

Welsh v. Wisconsin, 466 U.S. 740 (1984) 11

Wilson v. Arkansas, 514 U.S. 927 (1995) ..... *passim*

Wong Sun v. United States, 371 U.S. 471 (1963) 15

CIRCUIT COURT CASES

Bingman v. Ward, 100 F.3d 653 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1473 (1997) 49

Bonner v. Anderson, 81 F.3d 472 (4th Cir. 1996) 18

Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970) 28, 37

Gilbert v. United States, 366 F.2d 923 (9th Cir. 1966), *cert. denied*, 388 U.S. 922 (1967) 35, 41

Hair v. United States, 289 F.2d 894, 110 U.S. App. D.C. 153 (D.C. Cir. 1961) 20

Kornegay v. Cottingham, 120 F.3d 392 (3rd Cir. 1997) 18

TABLE OF AUTHORITIES – Continued

Page

United States v. Bates, 84 F.3d 790 (6th Cir. 1996) 18

United States v. Becker, 23 F.3d 1537 (9th Cir. 1994) 4, 6, 7, 36

United States v. Brown, 52 F.3d 415 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 754 (1996) 18, 37

United States v. Hudson, 100 F.3d 1409 (1996), *cert. denied*, 1997 WL 593044 (Oct. 20, 1997) 34

United States v. Jerez, 108 F.3d 684 (7th Cir. 1997) 17

United States v. Kane, 637 F.2d 974 (3rd Cir. 1981) 41

United States v. Kemp, 12 F.3d 1140 (D.C. Cir. 1994) 18

United States v. Maden, 64 F.3d 1505 (10th Cir. 1995) 27, 37, 48

United States v. McConney, 728 F.2d 1195 (9th Cir.), *cert. denied*, 469 U.S. 824 (1984) 4, 7, 28

United States v. McShane, 462 F.2d 5 (9th Cir. 1972) 35

United States v. Moore, 956 F.2d 843 (8th Cir. 1992) 48

United States v. Nolan, 718 F.2d 589 (3rd Cir. 1983) 20

United States v. Perez, 67 F.3d 1371 (9th Cir. 1995) 34

United States v. Phelps, 490 F.2d 644 (9th Cir. 1974), *cert. denied*, 419 U.S. 836 (1976) 48

United States v. Pratter, 465 F.2d 227 (7th Cir. 1972) 20

United States v. Ramirez, 770 F.2d 1458 (9th Cir. 1985) 35

United States v. Reed, 15 F.3d 928 (9th Cir. 1994) 34

United States v. Rivera, 928 F.2d 592 (2d Cir. 1991) 49

TABLE OF AUTHORITIES – Continued

Page

United States v. Ruminer, 786 F.2d 381 (10th Cir. 1986) 18

United States v. Sagaribay, 982 F.2d 906 (5th Cir.), *cert. denied*, 114 S. Ct. 160 (1993) 48

United States v. Scott, 74 F.3d 175 (9th Cir.), *cert. denied*, 117 S. Ct. 131 (1996) 34

United States v. Stewart, 867 F.2d 581 (10th Cir. 1989) 27, 33

United States v. Stiver, 9 F.3d 298 (3rd Cir. 1993), *cert. denied*, 114 S. Ct. 1115 (1994) 48

United States v. Stowe, 100 F.3d 494 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1438 (1997) 39

United States v. Turner, 926 F.2d 883 (9th Cir.), *cert. denied*, 502 U.S. 830 (1991) 35

United States v. Von Willie, 59 F.3d 922 (9th Cir. 1995) 34

DISTRICT COURT CASES

King v. Marmon, 793 F. Supp. 1030 (D. Kansas 1992) 28

United States v. Sims, 231 F. Supp. 251 (D. Md. 1964) 42

STATE COURT CASES

Bell v. Clapp, 10 Johns R. 263 (N.Y. Sup. Ct. 1813) 43

People v. Bennetto, 517 P.2d 1163 (Cal. 1974) 39

TABLE OF AUTHORITIES – Continued

Page

People v. DeLago, 16 N.Y.2d 289 (1965), *cert. denied*, 383 U.S. 963 (1966) 44

People v. Gastelo, 432 P.2d 706 (Cal. 1967) 34

People v. Krueger, 675 N.E.2d 604 (Ill.1996), *cert. denied*, 118 S. Ct. 49 (1997) 38

People v. Mendoza, 176 Cal. App. 3d 1127 (1986) 28

Phelps v. McAdoo, 94 N.Y.S. 265, 47 Misc. 524, 16 N.Y. Ann. Cas. 470, 19 N.Y.Cr.R. 126 (1905) 43

Poole v. United States, 630 A.2d 1109 (D.C. App. 1993), *cert. denied*, 513 U.S. 855 (1994) 38

Read v. Case, 4 Conn. 166 (1822) 10, 46, 49

State v. Bamber, 630 So. 2d 1048 (Fla. 1994) 22

State v. Dixon, 924 P.2d 181 (Haw. 1996) 31

State v. Jeter, 634 P.2d 312 (Wash. App. 1981) 39

State v. Moore, 535 N.W.2d 417 (Neb. Ct. App. 1995) 28

State v. Myers, 689 P.2d 38 (Wash. 1984) 31

State v. Ogden, 640 A.2d 6 (Vt. 1993) 28

State v. Stevens, 511 N.W.2d 591 (Wis. 1994), *cert. denied*, 515 U.S. 1102 (1995) 49

Trosper v. State of Alaska, 721 P.2d 134 (Alaska Ct. App. 1986) 28

ENGLISH CASES

Launock v. Brown, 2 B. & Ald. 592, 106 Eng. Rep. 482 (K.B. 1819) 20

Mahomed v. The Queen, 4 Moore 239, 13 Eng. Rep. 293 (P.C. 1843) 39

TABLE OF AUTHORITIES – Continued

Page

Ratcliffe v. Burton, 3 Bos. & Pul. 223, 127 Eng. Rep. 123 (K.B. 1802) 19

Semayne's Case, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194 (K.B. 1603) 11

STATUTES AND RULES

18 U.S.C. § 922(g)(1) 4

18 U.S.C. § 3109 ..... *passim*

Act of June 25, 1948, ch. 645, P.L. No. 772, 1948 U.S.C. Cong. Serv. (62 Stat. 820) 42

Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1236 21

Espionage Act of 1917, tit. XI, ch. 30 § 8-9, 40 Stat. 217 ..... 42, 43

Extension of Controlled Substances Act, Pub. L. 93-481, § 3, 1974 U.S.C.C.A.N. (88 Stat.) 1455 22

Or. Rev. Stat. §§ 161.205(5), 161.219(2), 161.225 21

N.Y. Code Crim. Proc. § 799 (McKinney 1938) 44

N.Y. St. Sess.5, ch.39 (April 13, 1782) 44

N.Y. State Laws, vol. 1 (1777-84) 44

OTHER

119 Cong. Rec. 15,170-76 (1973) 22

120 Cong. Rec. 22,884 (1974) 26

120 Cong. Rec. 22,886-88 (1974) 22, 23

120 Cong. Rec. 26,780-81 (1974) 23

TABLE OF AUTHORITIES – Continued

Page

120 Cong. Rec. 26,874 (1974) 22

Conference Report No. 65, accompanying H.R. 291, 65th Cong. 1st Sess. (1917) 43

Conference Report No. 93-1442 (1974), 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 5974, 5976 45

Klaus P. Fischer, *Nazi Germany, A New History*, (Continuum Press 1995) 37

Charles Garcia, *The Knock and Announce Rule: A New Approach to the Destruction of Evidence Exception*, 93 Colum. L. Rev. 685 (1993) 22, 23

H. R. Report No. 93-1248 (1974) 23

James Bovard, *Lost Rights* (St. Martins Press 1994) 24, 25

Jennifer Goddard, *The Destruction of Evidence Exception to the Knock and Announce Rule: A Call for Protection of Fourth Amendment Rights*, 75 B.U. L. Rev. 449 (1995) 24, 49

Joseph Story, *Commentaries on the Constitution of the United States* (5th ed. 1891) 26

Kemal Mericli, *The Apprehension of Peril Exception to the Knock and Announce Rule – Part I*, 16 *Search And Seizure Law Report* (July 1989) 45

Morgan Cloud, *Searching Through History; Searching For History*, 63 U. Chi. L. Rev. 1707 (Fall 1996) 46

National Institute of Justice, *Guns in America: National Survey on Private Ownership and Use of Guns* (1997) 1997 WL 222777 21

TABLE OF AUTHORITIES – Continued

Page

Note, *Announcement in Police Entries*, 80 Yale L.J. 139, 144 (1970) 45, 46

Note, *No-Knock and the Constitution*, 55 Minn. Law. Rev. 871 (1971) 46

Robert Driscoll, *Unannounced Police Entries and Destruction of Evidence After Wilson v. Arkansas*, 29 Colum. J.L. & Soc. Probs.1 (Fall 1995) 46

William L. Shirer, *The Rise and Fall of the Third Reich* (Touchstone ed. 1981) 37

Thomas McAffee, *Bringing Forward the Right to Keep and Bear Arms*, 75 N.C. L. Rev. 781 (1997) 21

William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* (1990) (unpublished Ph.D. dissertation, at Claremont Graduate School) 17, 46

Wayne R. LaFave, *Search and Seizure* (3d ed. 1996) 17, 21, 22

NEWSPAPER ARTICLES

Philip J. LaVelle, *Excesses Blamed on "Bad" Raids*, SAN DIEGO UNION-TRIBUNE (December 13, 1992) 1992 WL 4766590 25

Drug Raid Shooting Victim Wins $225,000 Settlement, DENVER POST (April 3, 1996) 1996 WL 6689450 25

This Week's Question: Do You Think It Is Safe to Have a Loaded Gun in the House? THE OREGONIAN (July 31, 1997) 1997 WL 4194863 21

STATEMENT OF THE CASE

A. The Facts Surrounding The Breaking

In the pre-dawn hours of Saturday, November 5, 1994, Respondent Hernan Ramirez, his wife Cynthia, and his three-year-old son Christopher were asleep in their residence in rural Boring, Oregon. Pet. App. 43a. The house has three bedrooms, a living room, a kitchen, and an attached garage. The property covers several acres and includes, in addition to the home, a large workshop and several trailers. *Id.*

At 6:15 a.m., about forty-five armed law enforcement officers surrounded the residence of Mr. Ramirez and his family. Pet. App. 43a. They came to execute a federal search warrant for one Alan Shelby, who had escaped from custody on November 2, 1994. While en route to testify on an associate's behalf in Tillamook County, Shelby slipped his handcuffs, struck a deputy sheriff, and escaped. Shelby had a history of escapes, violent conduct, and criminal convictions; he had vowed that he would not serve time in a federal prison. *Id.*

On November 3, 1994, agents obtained information from a person termed a confidential, reliable informant that he had seen a person believed to be Shelby on the Ramirez property. Pet. App. 39a. The informant overheard a person named "Alan" say words "approximating" the statement, "I had to knock out a guard." The informant thought nothing of it until he read an article about Shelby's escape in the next day's newspaper; he then contacted ATF Agent Kim. Pet. App. 39a. The informant also indicated Ramirez himself was "possibly" involved in drugs, which he kept in the garage, and that there were "supposed to be" several guns in the garage as well. Pet. App. 43a-44a.

Agent Kim took the informant out to the property, and they saw a man whom "they believed" to be Shelby outside the residence washing a car. Agent Kim described the man they saw as very similar to the photograph of Shelby. Pet. App. 39a-40a. Deputy U.S. Marshal Kauffmann then drove to the Ramirez residence. From "1,000 yards away" Kauffmann saw a person whom he believed was the same person

described by Kim, but he "could not make a positive" identification. *Id.*

On November 4, 1994, Marshal Kauffmann applied for a warrant to search the Ramirez home for Shelby. He sought authorization to serve the warrant at night and without compliance with the knock-and-announce requirement set forth in 18 U.S.C. § 3109. Pet. App. 44a. According to Kauffmann's affidavit, Shelby had attempted an escape in 1991 by striking a corrections officer in the face, assaulting a woman in a parking lot and stealing her vehicle, and ramming a police vehicle with the stolen vehicle. Pet. App. 38a. Shelby had also made threats to kill witnesses and police officers associated with his incarceration and had brutally tortured others in the past with a hammer. Pet. App. 38a-39a. Finally, the affidavit stated Shelby "has had" access to large caches of weapons. Pet. App. 39a. Kauffmann prepared the warrant with "no-knock language," and the Magistrate-Judge signed it. Pet. App. 44a. Between the time of Kauffmann's last "sighting" of Shelby on November 3 and the time of the raid on November 5, the officers received no confirmation of Shelby's presence on the property. Pet. App. 10a.

At the time of the raid, special SWAT teams of state and county officers surrounded the Ramirez property. Pet. App. 44a. One team was responsible for clearing and securing the large workshop building and two of the trailers. Another was responsible for securing the garage area of the residence through the east side window and for securing another trailer. Pet. App. 44a.

Officer Barnum broke out the glass of the garage window. Pet. App. 44a. While he did so, Sergeant VeraCruz shouted several times, "Sheriff's Office, Search Warrant" at the window. Pet. App. 44a. VeraCruz then began to "gunport" the window, that is, aiming and moving his gun through the window, ready to shoot if necessary, but he had trouble when the window's curtain got in his way. *Id.* At about the same time as this activity at the garage window, an officer using a loudspeaker announced the officers' presence and ordered the occupants to come out. Pet. App. 45a. However, an officer who was at the garage window was unable to hear what was

being announced over the loudspeaker because of VeraCruz's yelling. *Id.*

Inside the residence, Mr. Ramirez and his wife were awakened by outside noises and the breaking of glass. Pet. App. 45a. He and his wife "thought they were being burglarized, and they feared for their safety and that of their child who had awakened and who was crying." *Id.* "After hearing the glass breaking," Mr. Ramirez ran to a closet, obtained a gun, and ran to the entrance of the garage. Pet. App. 45a. "In a state of panic," Mr. Ramirez fired toward the ceiling "in an effort to scare away the intruders." *Id.*

The law enforcement officers returned fire and simultaneously shouted, "Police, police." Pet. App. 45a. "Realizing, for the first time, that law enforcement officers were outside and trying to enter his residence," Mr. Ramirez ran to the living room, threw away the firearm across the floor, and "threw himself on the floor in a prone position, shaking from fright." *Id.* Mr. Ramirez stated that had he known the police were trying to enter his home, "he never would have fired the weapon." Pet. App. 46a. Ultimately, Mr. Ramirez and his wife, carrying her child in her arms, walked out of the house into police custody. "Despite a thorough search of the property, the officers did not find Shelby on the premises." Pet. App. 46a.

After receiving and waiving his *Miranda* rights, Mr. Ramirez admitted he was a convicted felon and that he owned the gun that he had fired, as well as another firearm. Pet. App. 46a. He said he had been awakened by noises outside his house and heard the sound of breaking glass. He said he fired up in the air to scare away the persons he thought were trying to burglarize his home. *Id.* Mr. Ramirez said neither he nor his wife had heard any announcement by the officers. Shown a picture of Shelby, Mr. Ramirez said a man resembling Shelby might have been on the property two days earlier. *Id.* Mrs. Ramirez told Kim that she believed she was being burglarized and/or attacked by intruders, and she did not know that the police were trying to enter. *Id.*

Agent Kim used the information furnished by Mr. Ramirez, along with an officer's observation of the gun on the

living room floor, to obtain another search warrant. Executing the second warrant, agents re-entered the residence and retrieved the pistol on the living room floor and a second one in a box as Mr. Ramirez had described. Pet. App. 46a-47a.

The United States Attorney in the District of Oregon obtained an indictment charging Mr. Ramirez with possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1). Mr. Ramirez moved to suppress the two firearms that formed the basis of the charge, and the district court granted the motion. Pet. App. 28a-36a. The court of appeals affirmed. Pet. App. 1a-27a.

B. The Decision Of The District Court Suppressing The Firearms

The district court rejected Mr. Ramirez's argument that the warrant was not based on probable cause, but granted his motion to suppress on the grounds that the officers had violated both 18 U.S.C. § 3109 and the Fourth Amendment. The court relied on the Ninth Circuit's long-standing test for "exigent circumstances" set forth in *United States v. Becker*, 23 F.3d 1537, 1540-41 (9th Cir. 1994), and *United States v. McConney*, 728 F.2d 1195 (9th Cir.) (*en banc*), *cert. denied*, 469 U.S. 824 (1984). Following *Becker*'s reasoning, the district court acknowledged that "mild exigency," such as knowledge that a person is dangerous, can justify immediate entry into a residence that is accomplished without destruction of property. Pet. App. 32a. To justify destruction of property, however, "more specific inferences of exigency are necessary." *Id.*

The district court found that, although there were specific facts regarding Shelby's propensity to attempt escape, his disdain for federal incarceration, and his past willingness to use threats and violence as means of intimidation, "there was no information that he was armed and dangerous at defendant's home, or that he would present any specific dangers to arresting officers if found there." Pet. App. 34a. The court concluded that there were

> insufficient exigent circumstances to establish that Shelby presented such a threat to the force deployed to apprehend him in the early morning of 5 November as to justify abandoning the "simple and ancient requirement that the officers ought to signify the cause of [their] coming, and to make request to open doors" before destroying property during a governmental intrusion into a person's home.

Pet. App. 34a (citation omitted).

C. The Decision Of The Court Of Appeals Affirming The District Court

The court of appeals affirmed the district court in a 2-1 opinion. Although the court had "some question" as to the existence of probable cause to believe that Shelby was at the residence, the court assumed it existed. Pet. App. 12a n.1. The court observed that "nowhere is the protective force of the fourth amendment more powerful than when the sanctity of the home is involved." *Id.* at 5a (citations omitted). The Amendment protects the "privacy, the safety, and the property" of our citizens. *Id.* at 6a.

The court founded its analysis on *Wilson v. Arkansas*, 514 U.S. 927 (1995). Citing *Wilson*, the court explained that the knock-and-announce principle "was woven quickly into the fabric of early American law" and that, as a matter of constitutional law, "the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search and seizure." Pet. App. 6a-7a (quoting *Wilson*, 514 U.S. at 933). The court of appeals stated:

> Our cases do not describe a simple straight line, rather they graph a much more complex curve. Police must have some leeway in balancing the demands of the knock-and-announce requirement against other safety considerations. Nevertheless, the courts must ultimately determine whether the police struck that balance properly.

Pet. App. 11a.

The court stated that the common law tradition finds expression in the federal knock-and-announce rule, codified at 18 U.S.C. § 3109, which allows an officer to break open a door or window of a house to execute a warrant only if, after notice of his authority and purpose, he is refused admittance. "We insist upon this notice," said the court, "because, as individuals, we fear for our privacy in the face of government might, and we fear for our property and our safety as well." Pet. App. 7a. The court reiterated that "the fear of a smashing in of doors by government agents is based upon much more than a concern that our privacy will be disturbed. It is based upon concern for our safety and the safety of our families. . . . " *Id.* (quoting *Becker*, 23 F.3d at 1540).

Citing this Court's admonition in *Sabbath v. United States*, 391 U.S. 585, 589 (1968), the court of appeals explained, "[w]e also fear the needless injuries that might be inflicted upon police officers, or upon a homeowner, as a result of the homeowner's mistaken belief that miscreants are invading his little castle." Pet. App. 7a. The court said a near-tragedy had occurred in the instant case because when the officers executed the warrant, "they brushed aside the wisdom of history and elicited a response which, if not strictly intended, should have been reasonably foreseen." *Id.* at 8a. The court observed:

> Had Ramirez been less reasonable, the officer at the window might have been killed; had Ramirez been less wise, he or his family might have been killed. As it was, his property was needlessly damaged when his home was broken into.

Pet. App. 8a. Elaborating, the court asked rhetorically, "What could [the agents] have expected when they broke into the home of a sleeping family in the early hours of the morning?" *Id.* at 14a. Mr. Ramirez "fired a gun at the ceiling of his own home when unknown intruders were invading it." *Id.* at 16a.

The court of appeals readily agreed that exigent circumstances could justify breaking into a house without notice, but noted that "mere incantation of that phrase" was not sufficient. Pet. App. 16a. It was the duty of the courts to determine "what kind of exigency it was." *Id.* at 8a. The court noted

that, in the case at bar, "an officer broke into the home through a window, poked a gun through the window, and was ready to fire the weapon if he deemed it necessary to do so." *Id.* The court said more than a "mild exigency" was needed to justify this action. *Id.* The court added that to justify physical destruction of property "more specific inferences of exigency are necessary." *Id.* (quoting *Becker*, 23 F.3d at 1541).

In determining the kind of exigency that existed, the court reasoned that the forty-five armed officers did not fear any of the actual residents of the house and were not attacking a gang or cult hangout "where they might be met by a fusillade of gunfire." Pet. App. 9a. They were concerned about one person, Shelby, who "might" be on the premises, but Shelby was "not known to have ever shot or shot at anyone." *Id.* The court explained, "there [was] no suggestion that the police presence was known, no confirmation that Shelby was on the premises and, more importantly, no indication that Shelby was armed and would resist with deadly force." *Id.* at 10a-11a. The court reiterated that the officers "did not know that Shelby had a gun, nor that he had access to one, nor that he would consider using one against them." Pet. App. 11a.

The court stated its review of the case was "necessarily fact bound." Pet. App. 11a. The court concluded by holding that the officers' actions violated both Section 3109 and the Fourth Amendment. Pet. App. 17a.

The dissenting judge disagreed with the majority's result and claimed it was inconsistent with other cases in the circuit. However, the dissent never attacked the soundness of the approach set forth in *Becker* and *McConney*; nor did the dissent assert that the approach conflicted with that employed by any other circuit. Pet. App. 18a-27a.

SUMMARY OF ARGUMENT

I. Invasion of the home is the "chief evil against which the Fourth Amendment is directed." *United States v. United States District Court*, 407 U.S. 297, 313 (1972). The knock-and-announce requirements help guard against this evil. They

are part of our received wisdom from the common law and part of the Fourth Amendment. *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). Codified in 18 U.S.C. § 3109, the knock-and-announce requirements are "deeply rooted in our heritage and should not be given a grudging application." *Miller v. United States*, 357 U.S. 301, 313 (1958).

A. The courts below correctly determined that the officers violated both Section 3109 and the Fourth Amendment by breaking the window of the attached garage of the Ramirez family residence during the night and by thrusting a firearm inside. The courts correctly balanced the need for government intrusion against the interests protected by the Fourth Amendment and Section 3109. In assessing the reasonableness of the officers' actions, the court of appeals properly analyzed the totality of the circumstances surrounding the entry and properly considered and weighed the factor of property damage. Contrary to the government's argument, the analysis employed by the Ninth Circuit in the case at bar is fully consistent with *Richards v. Wisconsin*, 117 S. Ct. 1416 (1997), and the mainstream of Fourth Amendment jurisprudence.

In evaluating the reasonableness of the officers' decision not to comply with the knock-and-announce rule, the courts look not only to the officer's state of mind with respect to his safety, as the government suggests, but also to the safety, privacy, and property interests of the occupants. The government acknowledged this principle in the court of appeals, but takes a contradictory position here.

Damage to property directly bears on the reasonableness of the officers' decision to make an unannounced entry, and the government cites no case to the contrary. Prevention of such damage is a fundamental purpose of the knock-and-announce rule. Furthermore, property damage directly bears on officer safety. Another fundamental purpose of the rule is "to safeguard officers who might be mistaken, upon an unannounced intrusion into a home, for someone with no right to be there." *Sabbath*, 391 U.S. at 589. The negative experience with the no-knock law of 1970, the tragedies which led to its speedy repeal in 1974, and the contemporary accounts of tragedies confirm that damage to property directly affects

officer safety. In view of the greater risk to the safety of the officers and residents when property is damaged, the court of appeals properly requires greater justification for a no-knock entry where property is damaged than when it is not. The greater the governmental intrustion on protected interests, the more justification is required.

The government's attempt to divorce the reasonableness of the decision to make an unannounced entry from the manner of the entry makes no sense in this case. The court below decided only a single issue: the decision to make the no-knock entry *by* breaking the garage window was unreasonable.

The reasonableness of the officers' actions must be tested case by case. Therefore, courts should not defer to the officers' decision with respect to how the warrant is executed, particularly where no new facts develop at the scene. Moreover, deference is not desirable because officers are engaged in the "competitive enterprise of ferreting out crime" and are not "neutral" in the manner in which they exercise discretion and judgment.

The approach of the court of appeals reduces the danger to the officers and does not increase it. The government accepted the Ninth Circuit's approach for the last twenty-five years without complaint.

Contrary to the government's assertion, the shattering and the "gunporting" of the window was not "*de minimis*." While the value of the glass was not great, it is the officers' invasion of the sanctity of the home that is not trivial. The officers' action was bound to terrify the sleeping family and cause Mr. Ramirez to defend himself, his wife, and his three-year-old child. It was wholly foreseeable that the officers' action could jeopardize the safety of the officers as well as the family.

B. Even if the court of appeals wrongly considered or wrongly weighed property damage, its result should still be affirmed because there was insufficient evidence Shelby was on the premises at the time of the entry. Furthermore, even had Shelby been there, he would have posed little realistic threat of danger to the forty-five armed officers that were

deployed against him. The district court found that "the officers had no information that Shelby was armed while in the residence or that he would present any specific dangers to arresting officers." This finding was not erroneous.

C. The government concedes that the needless destruction of property can violate the Fourth Amendment. Because the breaking of the window was "needless," the courts below reached the correct result.

II. A. The result below should be affirmed on the separate ground that the knock-and-announce requirement contained in Section 3109 is more restrictive than that embodied in the Fourth Amendment. In fact, Section 3109 contains no exception for officer safety at all. The plain words of the statute contain no such exception. Congress balanced the interests and determined that strict compliance with the requirements best promotes the safety of the officers and the occupants. The legislative history of the statute supports this reading. Moreover, Congressional enactment and repeal of the no-knock law of 1970 shows that, had Congress wanted to legislate an exception for officer safety, it knew how to do so. Finally, Section 3109 embodies the common law at the time of the framing of the Fourth Amendment, which did not recognize an officer-safety exception.

B. Even if Section 3109 contains an officer safety exception, it can be met only upon a showing that the officers had a reasonable belief of "imminent danger" if they complied with the knock-and-announce rule. This standard was enunciated in *Read v. Case*, 4 Conn. 166 (1822), the first case to recognize an officer-safety exception, and it is the standard to which federal law enforcement officers adhere. The government did not meet this standard here.

III. The result below should be affirmed on the additional grounds that the magistrate had no authority to issue a no-knock warrant. As a consequence, the warrant was void *ab initio*.

ARGUMENT

I. THE DISTRICT COURT AND COURT OF APPEALS PROPERLY APPLIED THE TOTALITY OF CIRCUMSTANCES TEST AND PROPERLY WEIGHED THE FACTOR OF DAMAGE TO PROPERTY IN DETERMINING THAT THE OFFICERS VIOLATED 18 U.S.C. § 3109 AND THE FOURTH AMENDMENT BY BREAKING THE GARAGE WINDOW AND THRUSTING A FIREARM INSIDE WITHOUT FIRST ANNOUNCING THEIR IDENTITY AND PURPOSE AND WITHOUT BEING REFUSED ADMITTANCE.

The Fourth Amendment to the Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Court has explained, "[i]t is axiomatic that the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984) (quoting *United States v. United States District Court*, 407 U.S. at 313). The Fourth Amendment "preserve[s] that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted." *Richards v. Wisconsin*, 117 S. Ct. 1416, 1421 n.4 (1997) (quoting *Minnesota v. Dickerson*, 508 U.S. 366, 380 (1993) (Scalia, J., concurring)).

The knock-and-announce rule, codified at 18 U.S.C. § 3109, is part of our received wisdom from the common law. *See Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 196 (K.B. 1603) (before an officer may "break the party's house . . . [he] ought to signify the cause of his coming, and make request to open doors"). The rule is predicated on the same core values that animate the Fourth Amendment's protection of the individual's security, privacy and property. The Court's first case addressing Section 3109 established that "the requirements of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application." *Miller*, 357 U.S. at 313. Forty years later, the unanimous Court

made clear that the knock-and-announce rule is part of the Fourth Amendment. *Wilson*, 514 U.S. at 931.

The court of appeals correctly applied these principles in finding that the entry in this case violated both Section 3109 and the Fourth Amendment. In the totality of circumstances, the officers had insufficient justification for shattering the window of the Ramirez home in the pre-dawn hours of the morning and thrusting a firearm inside.

A. The Court Of Appeals Properly Considered And Weighed Damage To Property As A Factor Among The Totality Of Circumstances.

In assessing the reasonableness of the officers' failure to comply with the knock-and-announce rule, the court of appeals simply engaged in the traditional Fourth Amendment balancing test. Balancing the need for governmental intrusion against the interests invaded by the governmental action is at the core of Fourth Amendment jurisprudence.[1] The Court's recent rejection of any blanket exceptions to the knock-and-announce rule emphasizes the propriety of balancing to evaluate the reasonableness of unannounced entries "under the particular circumstances" of each case. *Richards*, 117 S. Ct. at 1421-22[2]

The "reasonableness" of any police action is always measured "in objective terms by examining the totality of the

---

[1] *See, e.g., Tennessee v. Garner*, 471 U.S. 1, 8 (1985); *Delaware v. Prowse*, 440 U.S. 648, 654 (1979) ("the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests"); *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *Camara v. Municipal Court*, 387 U.S. 523, 534-35 (1967).

[2] The Court has previously explained that "a claim under 18 U.S.C. § 3109 depends upon the particular circumstances surrounding the execution of the warrant." *Jones v. United States*, 362 U.S. 257, 272 (1960) (citing *Miller*, 357 U.S. at 301), *overruled on other grounds, United States v. Salvucci*, 448 U.S. 83 (1980).

circumstances."[3] In assessing the circumstances surrounding the unannounced entry here, the court of appeals properly considered Shelby's threats, his history of violence, and his history of escapes. The court also considered that there were "supposed" to be firearms in the garage. In addition, the court considered the following factors: 1) the raid was of a family residence at night; 2) the residence was not fortified or inhabited by a vigilant gang of thugs; 3) there was no confirmation that Shelby was on the property a the time of the entry as he had not been seen for two days and was highly mobile; 4) Shelby was not known to be armed; 5) Shelby had never shot at anyone in the past, much less a police officer; 6) a force of forty-five armed officers was deployed around the residence to prevent Shelby's escape and to put down any resistance; and 7) a window was shattered upon entry, and a firearm was thrust inside – the kind of property damage and invasion of the home that would foreseeably terrorize the homeowner and cause him to act in defense of himself, his wife, and his young child.

The government takes issue with the seventh factor and argues that a totality of the circumstances test that includes property damage as one factor should not be applied in this case. Gov. Br. 27. The government points to the statement in *Richards* that, in order to justify a no-knock entry in a particular case, the police need only have developed a "reasonable suspicion" (as opposed to probable cause) that compliance with the rule would be "dangerous, futile, or inhibit the effective investigation of crime." 117 S. Ct. at 1421-22. Property damage, argues the government, is not relevant to this consideration.

---

[3] *Ohio v. Robinette*, 117 S. Ct. 417, 421 (1996); *see Maryland v. Wilson*, 117 S. Ct. 882, 884 (1996) (the "touchstone of our analysis under the Fourth Amendment is always the reasonableness in all the circumstances of the particular governmental invasion. . . . "); *Graham v. Connor*, 490 U.S. 386, 397 (1989) ("as in other Fourth Amendment contexts . . . the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances that confront them").

The government's reliance on the *Richards* dictum is misplaced. *Richards* concerns the "useless gesture" and "destruction of evidence" exceptions to the knock-and-announce rule where unanticipated circumstances developed quickly at the scene. In *Richards*, the defendant not only recognized the police who were at his hotel room door to serve a search warrant for drugs, but also slammed the door in their faces.[4] The Court held that the defendant's "apparent recognition of the officers combined with the easily disposable nature of the drugs" justified the unannounced entry. *Richards*, 117 S. Ct. at 1421. The instant case, by contrast, concerns the assertion of an officer-safety exception in circumstances where the defendant had no knowledge that police were seeking entry to his home, no new facts developed at the scene, and the search was for a person, not readily disposable evidence.

Moreover, *Richards* addresses only the knock-and-announce principle embodied in the Fourth Amendment, not that embodied in 18 U.S.C. § 3109.[5] The government assumes that the two principles and their exceptions are coextensive (Gov. Br. 19-20 n.7), but this Court has never so held.[6] In

---

[4] *Richards*, 117 S. Ct. at 1419; *see Miller*, 357 U.S. at 310 (when occupant already knows purpose of police presence, announcement would be "useless gesture").

[5] The Fourth Amendment's knock-and-announce requirement can "give way under circumstances presenting a threat of physical violence." *Richards*, 117 S. Ct. at 1420 (quoting *Wilson*, 514 U.S. at 936). Other exceptions include: "(1) where the persons within already know of the officers' authority and purpose, or (2) where the officers are justified in the belief that *persons within* are in imminent peril of bodily harm, or (3) where those within, made aware of the presence of someone outside (because, for example, there has been a knock at the door), are then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted." *Ker v. California*, 374 U.S. 23, 47 (1963) (Brennan, J., dissenting) (emphasis added).

[6] *See Wilson*, 514 U.S. at 934 n.3 ("in *Miller*, our discussion focused on the statutory requirement of announcement found in 18 U.S.C. § 3109, not on the constitutional requirement of reasonableness"); *Ker*, 374 U.S. at 38 (reasonableness standard of the Fourth Amendment, rather than Section 3109, governs how state officers enter a suspect's home).

fact, the Court has never held that Section 3109 contains any exception for officer safety at all.[7] Significantly, *Amicus* Ohio, *et al.* ("Ohio") specifically does not address the application of Section 3109 because the states are affected only by Fourth Amendment law. *Amicus* Ohio Br. 1.[8]

The Ninth Circuit's approach in the case at bar is fully consistent with the holdings and dictum in *Richards*. The court of appeals correctly analyzed the reasonableness of the officers' beliefs and suspicions under the totality of circumstances that existed at the time of the entry.

---

[7] *See Sabbath*, 391 U.S. at 591 (not necessary to decide issue because facts do not show officer at risk); *Miller*, 357 U.S. at 309 (whether the "unqualified requirements" of the rule admit of an exception justifying noncompliance in exigent circumstances "is not a question we are called upon to decide in this case"). In dictum, the *Sabbath* Court suggested that the "limited exceptions" identified by Justice Brennan in *Ker* might also apply to Section 3109. The Court stated:

> Exceptions to any possible constitutional rule relating to announcement and entry have been recognized, *see Ker v. California*, 374 U.S. at 47 (opinion of Brennan, J.), and there is little reason why *those limited exceptions* might not also apply to Section 3109, since they existed at common law, of which the statute is a codification.

Sabbath, 391 U.S. at 591 n.8 (emphasis added). Tellingly, the limited exceptions set forth by Justice Brennan do not include officer safety. *See also Wong Sun v. United States*, 371 U.S. 471, 484 (1963) ("the Government claims no extraordinary circumstances – such as the imminent destruction of vital evidence, or the need to rescue a victim in peril.").

[8] In Part II of this brief at p. 41, Mr. Ramirez argues that the result below should be affirmed on the ground that the knock-and-announce requirements of Section 3109 are more restrictive than those embodied in the Fourth Amendment. For purposes of the present argument, however, Mr. Ramirez, like the government, assumes the knock-and-announce requirements contained in Section 3109 and those embodied in the Fourth Amendment are coextensive.

1. In Evaluating The Reasonableness Of The Decision To Make An Unannounced Entry, The Courts Do Not Look Only To Officer Safety But Also To The Occupants' Safety And The Preservation Of Their Privacy And Property.

The government asserts that the need to damage property in making an unannounced entry "has no bearing" on the law enforcement interests that justify the entry. Gov. Br. 17. The government implies that, under *Wilson* and *Richards*, the Court must evaluate the reasonableness of the officers' decision not to comply with the knock-and-announce rule by considering *only* the officer's state of mind with respect to his safety and not to other circumstances like the safety of persons in the house or damage to the homeowner's property. This is incorrect and a misreading of *Wilson* and *Richards*. As important as the interests in officer safety are, they nevertheless "stand in constant tension with the Constitution's protections of the individual against certain exercises of official power." *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973). That is to say, the safety, privacy, and property interests of the occupants of the dwelling must also be considered.

Moreover, in the court of appeals, the government took a different view of the relevance of damage to property. In its petition for rehearing *en banc*, the government contested only the Ninth Circuit's supposed according of "dispositive significance" to property damage, but urged that the law should consider "the extent of property damage . . . as a single factor in the reasonableness balancing test required by the Supreme Court's decision in *Wilson*."[9] The government's assertion in the court of appeals contradicts its position in this Court and was a correct statement of the law: damage to property is

[9] *See* Lodged Document E at 12-13 (Pet. For Rehearing *En Banc*).

clearly "a single factor" in assessing the reasonableness of the decision not to comply with the knock-and-announce rule.[10]

a) A Fundamental Purpose Of The Knock-And-Announce Rule Is To Prevent Damage To Property.

Damage to property is an important factor in assessing the reasonableness of an unannounced entry. The Court emphasized in *Richards* that the individual's interest in avoidance of damage to property "should not be minimized . . . [and is] not inconsequential." *Richards*, 117 S. Ct. at 1421 n.5. In fact, the ancient common law rule requiring announcement of identity and purpose was justified in part by the belief that announcement would avoid the "*destruction or breaking of any house . . . by which great damage and inconvenience might ensue.*" *Wilson*, 514 U.S. at 931 (quoting *Semayne's Case*, 5 Co. Rep. at 91a-91b, 77 Eng.Rep. at 195-96 (emphasis added)). Even the government acknowledges, as it must, that "one of the interests that underlie the knock-and-announce principle is the avoidance of damage to property." Gov. Br. 13, 24 n.9 (quoting *Wilson*, 514 U.S. at 931); *see generally* 2 Wayne R. LaFave, *Search and Seizure* § 4.8(a) at 599 (3d ed. 1996) ("preventing the physical destruction of property [is one of the three] most worthwhile" goals underlying the rule).

Every Circuit court that has addressed the issue agrees that prevention of damage to property is one of the three

[10] Under the government's current logic, the fact that the entry here occurred at night would also be irrelevant. Yet it is clear that framers of the Fourth Amendment condemned nocturnal entries and searches. *See* William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* (1990) at 1346, 1510-11 (unpublished Ph.D. dissertation, at Claremont Graduate School); *cf. United States v. Jerez*, 108 F.3d 684, 690 (7th Cir. 1997) ("when a knock at the door comes in the dead of night, the nature and effect of the intrusion into the privacy of the dwelling place must be examined with the greatest of caution"). The government's effort to eliminate the factor of property damage is not only illogical, it is dangerous.

fundamental interests safeguarded by Section 3109. As recently stated by the Sixth Circuit:

> As recognized by other Circuits addressing this issue, the interests protected by § 3109 include: (1) the reduction of potential for violence to both the police officer and the occupants of the house into which entry is sought; (2) the needless destruction of private property; and (3) a recognition of the individual's right to privacy in his house.

United States v. Bates, 84 F.3d 790, 794 (6th Cir. 1996).[11] These interests are "not debatable." *United States v. Brown*, 52 F.3d 415, 421 (2d Cir.1995), *cert. denied*, 116 S. Ct. 754 (1996).

Given that a fundamental purpose of the knock-and-announce rule is the prevention of damage to property, it makes no sense to say, as the government now does, that in determining whether officers comply with the rule, they (and the reviewing courts) may not consider damage to property under the totality of circumstances surrounding the entry. The government fails to cite to a single case, federal or state, so holding.[12]

---

[11] *Accord Kornegay v. Cottingham*, 120 F.3d 392, 396 (3rd Cir. 1997); *Bonner v. Anderson*, 81 F.3d 472, 474 (4th Cir. 1996); *United States v. Kemp*, 12 F.3d 1140, 1142 (D.C. Cir. 1994); *United States v. Ruminer*, 786 F.2d 381, 383 (10th Cir. 1986).

[12] The government argues that *Sabbath* supports the conclusion that damage to property is irrelevant to the decision to make an unannounced entry. Gov. Br. 19-20. *Sabbath* holds that damage to property in effecting an unannounced entry is not necessary to trigger the requirements of Section 3109. The government observes that *Sabbath* did not suggest that because no property was damaged, a "mild exigency" would have sufficed to justify the unannounced entry. The government's logic is faulty. Because there was no property damage in *Sabbath*, the Court had no need to, and did not, focus on the law that would have applied had there been such damage.

b) Damage To Property Directly Bears On Officer Safety.

The government is incorrect when it argues that damage to property "has no bearing on the presence of the law enforcement interests that justify th[e] entry." Gov. Br. 17. Damage to property directly bears on the officers' interest in safety. The law protects property not merely for the value of the property itself, but because of the wholly foreseeable dangers to the officers that can flow from damage to property during an unannounced entry. The common law recognized that the unannounced breaking into a man's home "must tend to create breaches of the peace by provoking resistance." *Ratcliffe v. Burton*, 3 Bos. & Pul. 223, 230, 127 Eng. Rep. 123, 126-27 (K.B. 1802). This in turn obviously puts the officer at great risk.

This was particularly true, as in the instant case, where officers sought to search for a fugitive in the home of a presumptively innocent third party. As so cogently expressed in *Ratcliffe* by Judge Heath:

> The law of England, which is founded on reason, never authorizes such outrageous acts as the breaking open every door and lock in a man's house without any declaration of the authority under which it is done. *Such conduct must tend to create fear and dismay, and breaches of the peace by provoking resistance.* This doctrine would not only be attended with great mischief to the persons against whom process is issued, but to other persons also, since it must equally hold good in cases of process upon escape, where the party has taken refuge in the house of a stranger. *Shall it be said that in such case the officer may break open the outer door of a stranger's house without declaring the authority under which he acts, or making any demand of admittance? No entry from the books of pleading has been cited in support of this justification, and Semayne's case is a direct authority against it.*

Id. (emphasis added).[13] The reasoning at common law was that violence was bound to follow an unannounced entry:

> . . . for if no previous demand is made, how is it possible for a party to know what the object of the person breaking open the door may be? He has a right to consider it as an aggression on his private property, which he will be justified in resisting to the utmost.

Launock v. Brown, 2 B. & Ald. 592, 594, 106 Eng. Rep. 482, 483 (K.B. 1819). This understanding leads directly to this Court's repeated observation that one fundamental purpose of Section 3109 is "to safeguard officers who might be mistaken, upon an unannounced intrusion into a home, for someone with no right to be there." *Sabbath*, 391 U.S. at 589.[14]

As stated by one court, while law enforcement officials "might be thought quite capable of protecting their own safety . . . Congress could reasonably have concluded that a directive such as Section 3109 would enhance the safety of law enforcement officials."[15] Statutes in every jurisdiction

---

[13] *See also Hair v. United States*, 289 F.2d 894, 896 n.8, 110 U.S. App. D.C. 153, 155 (D.C. Cir. 1961) (that the home belonged to a person other than person sought "is of some significance" in determining the validity of the unannounced entry).

[14] *See Miller*, 357 U.S. at 313-14 n.12 (compliance with Section 3109 "is also a safeguard for the police themselves who might be mistaken for prowlers and be shot down by a fearful householder"); *Ker*, 374 U.S. at 58 (Brennan, J., dissenting) ("one of the principal objectives of the English requirement of announcement of authority and purpose was to protect the arresting officers from being shot as trespassers"); *cf. McDonald v. United States*, 335 U.S. 451, 460-461 (1948) (Jackson, J., concurring) ("many home-owners in this crime-beset city doubtless are armed . . . [the home-owners'] natural impulse would be to shoot [a perceived stranger entering the house]").

[15] *United States v. Nolan*, 718 F.2d 589, 596 n.10 (3rd Cir. 1983); *see United States v. Pratter*, 465 F.2d 227, 233 n.16 (7th Cir. 1972) ("strict compliance with the statute is a protection to the safety of the arresting officers and to the effective accomplishment of their mission"); *see also*

excuse violence when directed against invaders of the home. *See, e.g.*, Or. Rev. Stat. §§ 161.205(5), 161.219(2), 161.225 (homeowner may use deadly force to protect persons and property if reasonably necessary). Given the widespread ownership of guns in the country, the unannounced breaking into a house, particularly at night, is obviously fraught with great danger to both police and residents.[16]

c) The Negative Experience With The No-Knock Law Of 1970 Confirms That Damage To Property Directly Affects Officer Safety.

In 1970, Congress enacted legislation authorizing magistrates to issue "no-knock" warrants in drug cases if the magistrate found probable cause to believe that compliance with the knock-and-announce rule would lead to the destruction of evidence or "[would] immediately endanger the life or safety of the executing officer or another person."[17] Congress repealed the law barely four years later, "when Congress

---

LaFave, *supra*, at 599 and cases cited therein ("an unannounced breaking into a home could quite easily lead an individual to believe that his safety was in peril and cause him to take defensive measures which he otherwise would not have taken had he known that a warrant had been issued to search his home").

[16] One recent report states that thirty-five percent of U.S. households own guns. (News Release, March 5, 1997, quoting National Institute of Justice, *Guns in America: National Survey on Private Ownership and Use of Guns* (1997)), 1997 WL 222777. Forty-four million Americans own 192 million firearms. *Id.* Other polls suggest the figure is closer to 50%. Thomas McAffee, *Bringing Forward the Right to Keep and Bear Arms*, 75 N.C. L. Rev. 781, 899 (1997) (citing polls). In Oregon, an estimated 51% of all households own guns. *This Week's Question: Do You Think It Is Safe to Have a Loaded Gun in the House?* The Oregonian (July 31, 1997) 1997 WL 4194863.

[17] *See* Section 509(b) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub.L. 91-513, 84 Stat. 1236, 1274 (codified at 21 U.S.C. § 879(b) (1970) (repealed).

learned" that no-knock warrants created a "staggering potential for violence to both occupants and police." LaFave, *supra*, at 622 n.111 (quoting *State v. Bamber*, 630 So.2d 1048, 1050 (Fla. 1994)).[18]

Indeed, during the four-year period when no-knock warrants were issued, "horror stories were legion." *Bamber*, 630 So.2d at 1050 n.4 (quoting Charles Garcia, *The Knock and Announce Rule: A New Approach to the Destruction of Evidence Exception*, 93 Colum. L. Rev. 685, 703-05 (1993)).

> Over 100 newspaper articles reproduced in the Congressional Record, described a repeated scenario: terrified citizens, thinking themselves targets of burglary or more frightening acts, discovered that they were instead being searched by law enforcement officers who had entered their home without notice. In an exhaustive eight-week investigation by The New York Times, consisting of interviews with victims of "no-knock" raids, reporters found that "[i]nnocent Americans around the country have been subject to dozens of mistaken, violent and often illegal police raids by local, state and federal narcotics agents in search of illicit drugs and their dealers."

Bamber, *supra*; *see* 120 Cong. Rec. 22,886-88 (1974) (N.Y. Times Article); *see also* 120 Cong. Rec. 26,874 (1974) (Wall St. J. Article); 119 Cong. Rec. 15,170-76 (1973) (numerous articles and letters to Senator Ervin).

Before passage of the repealing legislation, House and Senate committees extensively documented the abuses brought about by four years of no-knock warrants. The House Committee noted, for example, "several instances in which Department of Justice enforcement agents in their eagerness to crush illicit drug trafficking have mistakenly broken into the homes and apartments of dozens of innocent families, terrorizing the occupants and heavily damaging property." H.

---

[18] *See* Extension of Controlled Substances Act, Pub.L. 93-481, § 3, 1974 U.S.C.C.A.N. (88 Stat.) 1455, 1455-56.

R. Report No. 93-1248, at 6, 8 (1974); *see also* 120 Cong. Rec. 26,780 (1974). The Committee determined that law enforcement agencies were showing "a lack of discretion and attention to alternative methods of securing evidence on the part of the Department of Justice." H.R. Report at 8. According to the Committee, one of the reasons that repeal was warranted was that the empirical evidence showed that rather than reducing violence, no-knock warrants did the opposite: "rather than protecting the lives of agents [they had] in several instances resulted in serious injury and death of law enforcement officers and civilians." H.R. Report, *supra*, at 8; *see also* 120 Cong. Rec. 26,781 (1974).[19] Some of the tragedies caused by no-knock warrants were reported in the Congressional Record twenty-five years ago.[20] One was described as follows:

> In Norfolk Virginia at 3:00 a.m., on May 24, 1972, Mrs. Lillian Davidson, a previous burglary victim, heard someone breaking in her home. Then someone began to batter down her locked bedroom door. She grabbed a .32 caliber revolver and shot through the door. The bullet pierced the chest of Patrolman Lewis Hurst, Jr., the 22-year-old son of the head of the Norfolk Police Department Narcotics Squad. He died minutes later. The police arrested Mrs. Davidson. They were looking for 2,400 parcels of heroin that an informer had said were there. They were not. The police said it had been an error.

d) Violation Of The Knock-And-Announce Rule Continues To Endanger, Rather Than Protect, Law Enforcement Officers And Civilians.

Unfortunately, needless tragedies among police and civilians alike continue to occur with alarming frequency because

---

[19] In 1974, the Senate voted to repeal the no-knock statute by a 2 to 1 margin. Garcia, 93 Colum. L. Rev. at 703.

[20] 120 Cong. Rec. 22,886-88 (July 11, 1974) (excerpt from Exhibit 1, news article by Andrew Malcolm).

of destruction of property associated with noncompliance with the knock-and-announce rule. For example, in 1993, another person, ironically also named "Ramirez," and a police officer were not so lucky as the participants here. At 2:00 a.m. on January 25, 1993, without prior announcement, police smashed down the door and rushed into the home of Manuel Ramirez of Stockton, California.[21] Ramirez "awoke, grabbed a pistol, and shot and killed one policeman by his bedroom door before other police killed him."[22] The police were raiding the house based on a tip that drugs were on the premises, but they found none.

On March 25, 1994, the Reverend Accelynne Williams, a retired Methodist minister, "was enjoying the peace and security of his home" in the Boston, Massachusetts neighborhood of Dorchester:

> Without warning, thirteen armed Boston police officers burst into his apartment. Frightened, the Reverend ran into his bedroom; the officers continued the chase and smashed through his bedroom door. After wrestling with Reverend Williams, the officers clinched handcuffs around his wrist. Unable to withstand the shock of the intrusion, the seventy-five-year old minister suffered a fatal heart attack. Only then did the police officers discover they had made a mistake: They had invaded the wrong apartment; the Reverend's home did not contain the drugs for which the police were searching.[23]

---

[21] *See* James Bovard, *Lost Rights*, p. 236 (St. Martins Press 1994) (citing Stanton, *Stockton Man, Cop Die; Family Blames Mistake*, SACRAMENTO BEE, January 26, 1993).

[22] *Id.*

[23] Jennifer Goddard, *The Destruction of Evidence Exception to the Knock and Announce Rule: A Call for Protection of Fourth Amendment Rights*, 75 B.U.L.Rev. 449 (1995).

The Ramirez and Williams' tragedies are but two of the many that have occurred.[24] These tragedies illustrate the correctness of the Ninth Circuit's approach: the attendant dangers to both civilians and police require more specific evidence of danger to the officers to justify breaking in a door or window in making an unannounced entry than when they do not. It is no doubt true that officers (and innocent civilians) are killed whether or not the officers comply with the knock-and-announce principle. *See Amicus* Americans for Effective Law Enforcement ("AELE") Br. at 6-7 (citing four incidents). The empirical evidence gathered by Congress, however, and its consequent repeal of the no-knock law of 1970, together with the contemporary accounts of officer and civilian deaths, strongly support the conclusion that compliance with the knock-and-announce rule causes far fewer deaths than non-compliance. Senator Sam Ervin put the matter succinctly:

> I know of no provision of law which puts officers of the law in more jeopardy of life and limb than . . . "no-knock" searches of the homes of our citizens. *When someone attempts to break into the dwelling house of the average citizen in the night time, the average citizen is not going to wait to ascertain whether it is an officer of the law or whether it is a burglar. He is going to resist to the*

---

[24] For example, in December of 1992, a heavily armed force of drug agents shot and almost killed Donald L. Carlson, a Fortune 500 company executive, when they broke into his home looking for drugs. *See* Philip J. LaVelle, *Excesses Blamed on "Bad" Raids*, SAN DIEGO UNION-TRIBUNE (December 13, 1992) 1992 WL 4766590. Aroused from a deep sleep, Carlson wounded an officer as he fired in self-defense at persons he perceived to be criminal intruders; he was himself wounded three times. *Id.* at 3. No drugs were found. *Id; see also Drug Raid Shooting Victim Wins $225,000 Settlement*, DENVER POST (April 3, 1996), 1996 WL 6689450 (on April 2, 1996, armed officers broke into the home of Juan Rocha-Gallegos and shot him seven times in the chest, arms and legs during a no-knock drug raid). Other incidents described in news articles assembled in Lodged Document G; *see also* Bovard, *supra* note 21, at 233-37 (describing other incidents).

> *utmost, even to the taking of lives.* . . . It is ridiculous to say that breaking in without notice serves as protection for the police officer. The contrary is true. He is more likely to lose his life if he attempts to break in without notice.[25]

Contrary to the government's argument, property damage directly bears on the officers' interest in safety.[26]

---

[25] 120 Cong. Rec. 22,884 (1974) (emphasis added); *see also* Remarks of Representative Tim Lee Carter, 120 Cong. Rec. 26,781 (1974) ("In the area which I come from, if a man knocks the door down and goes in [without notice], he usually comes out feet first and the undertaker takes care of him. A man's house is his castle.").

[26] The government seeks to minimize the individual's interest in his property, arguing that the "principal object of the Fourth Amendment is the protection of privacy rather than property." Gov. Br. 18 (quoting *Soldal v. Cook County*, 506 U.S. 56, 64 (1992)). This contradicts the government's position, taken elsewhere in the brief, that excessive or "wholly unnecessary" property damage may indeed constitute a Fourth Amendment violation. Gov. Br. 23-24. In any event, the government takes the quotation from *Soldal* out of context and entirely misconstrues the case. In *Soldal*, the Court rejected the claim that the Fourth Amendment is primarily concerned with privacy rights as opposed to property rights. Indeed, the holding of the case was that the eviction of a tenant by means of seizing and moving his trailer did state a Fourth Amendment violation as a basis for a Section 1983 suit even though there was no invasion of privacy. The Court nowhere suggests the interest in property is less worthy of protection than privacy, but emphasizes the contrary: "our cases unmistakably hold that the Amendment protects property as well as privacy." 506 U.S. at 62. Furthermore, in *Richards*, the Court affirmed that "[t]he purpose of the Fourth Amendment's requirement of reasonableness is to preserve that degree of respect for the privacy of persons *and the inviolability of their property* that existed when the provision was adopted." 117 S. Ct. at 1421 n.4 (emphasis added). The Court admonished that the homeowner's interest in property is "not inconsequential" and should not be "unduly minimized." 117 S. Ct. at 1421 n.5; *see also* II Joseph Story, *Commentaries on the Constitution of the United States*, § 1902 (5th ed. 1891) (Fourth Amendment "seems indispensable to the full enjoyment of the right of personal security, personal liberty, and private property").

2. The Court Of Appeals Properly Requires More Evidence Of Danger To Justify Damage To Property.

The court of appeals correctly requires more evidence of danger to the officer to support a no-knock entry where property is damaged than when it is not. Damage to property is both a fundamental concern of the knock-and-announce rule and a much greater intrusion on the citizen's privacy. Furthermore, as previously shown, damage to property is more likely to result in death or injury to the police and the residents than if there is no such damage. Therefore, where property has been damaged, greater justification is required for the no-knock entry than were there no such damage. This weighing is at the core of Fourth Amendment jurisprudence: the greater the governmental intrusion on the individual's protected interests, the more justification is required. *See supra*, at 13, 14.

Circuits that have considered the question of property damage have expressed views consistent with that of the Ninth Circuit, even if none use the specific language that the Ninth Circuit employs. For example, the Tenth Circuit has observed that the conclusion of exigency "must be *especially clear* . . . where the destruction of physical property [takes] place." *United States v. Stewart*, 867 F.2d 581, 584 (10th Cir. 1989) (emphasis added). This language suggests that the Tenth Circuit, like the Ninth, requires more justification for an unannounced entry when damage occurs than when it does not.[27]

---

[27] The government has taken the view that the statement in *Stewart* should carry no weight because a subsequent case, *United States v. Maden*, 64 F.3d 1505 (10th Cir. 1995), shows that the Tenth Circuit does not require a greater evidentiary showing of danger when property is damaged. Pet. Cert. Reply at 3. While the court in *Maden* did say that it did not read *Stewart* to impose a specific showing of exigency for no-knock searches, these comments are questionable *dictum: Maden* involved no property damage at all because the police entered with a passkey. *Id.* at 1506-07.

Similarly, the Second Circuit has stated that one of the "touchstones" for determining the existence of exigent circumstances is "the peaceful circumstances of the entry." *Brown*, 52 F.3d at 421. This language also suggests that a heightened standard applies when there is destruction of property. *See also Dorman v. United States*, 435 F.2d 385, 393 (D.C. Cir. 1970) (reasonableness of warrantless, unannounced entry into home to look for fugitive, depends partly on whether entry made "peaceably"); *King v. Marmon*, 793 F. Supp. 1030, 1033 (D. Kansas 1992) ("courts have found that . . . more specific inferences of exigency are necessary when physical disruption of property is required").[28]

The government argues that, in other search-and-seizure contexts, the Court has never required a greater justification on the officers' part if their actions result in damage to property. Gov. Br. 19. By way of example, the government asserts that a pat-down search would not require probable cause, as opposed to reasonable suspicion, even if the officers intentionally tear the suspect's jacket during the search. *Id.* By way of further example, the government posits that the

---

[28] *Amicus* Ohio asserts that "none of the States has ever distinguished" between no-knock entries that require property damage and those that do not. *Amicus* Ohio Br. 9. This is not true as even the government's brief demonstrates. Gov. Br. 18 n.6. For example, in *State v. Ogden*, 640 A.2d 6 (Vt. 1993), the court affirmed a no-knock entry primarily on the ground that there was no destruction of property. The court said "where the police have knocked and announced their identity and purpose, an exigency may justify immediate entry if that entry can be accomplished without physical destruction of property." 640 A.2d at 9-10 (citing *McConney*, 728 F.2d at 1206). Similarly, in *Trosper v. State of Alaska*, 721 P.2d 134, 135 (Alaska Ct. App. 1986), the court observed that where there was no destruction of property only a "mild" exigency was required to excuse noncompliance with the knock-and-announce principle. *See also State v. Moore*, 535 N.W.2d 417, 421-22 (Neb. Ct. App. 1995) (agreeing with Ninth Circuit's approach and requiring officers to make showing of greater risk of danger when physical destruction of property is necessary); *People v. Mendoza*, 176 Cal. App. 3d 1127, 1131 (1986) ("[e]ven a mild exigency would have justified" the police having opened the door without breaking it – citing *McConney*).

intentional breaking of an object during a protective sweep of a home would not invalidate the underlying warrant. *Id.*

The government's assertions contradict its position taken elsewhere in its brief that excessive or "wholly unnecessary" damage can violate the Fourth Amendment. Gov. Br. 23-24. If the defendant's clothing were intentionally torn during a pat-down, or if his property were intentionally broken during a sweep of the home, a court would surely hold that the officer's intentional misconduct was unreasonable because it went beyond the scope of what initially justified the pat-down or sweep.[29] Furthermore, the government's examples are inapposite because neither a pat-down search nor a protective sweep is governed by the requirements of the knock-and-announce principle, one of whose fundamental purposes is the protection of the individual's home against invasion and damage.

Finally, the government cites *no* case, federal or state, even suggesting, much less holding, that in determining the objective reasonableness of the officers' decision to make an unannounced entry to search for a fugitive, the reviewing court may not require more specific evidence of the fugitive's presence and danger in order to justify damage to property.[30]

---

[29] *Cf. Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993) ("if the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed"). Even if there were no evidence to suppress, civil liability would arise for the Fourth Amendment violation.

[30] *Amicus* Ohio argues that the approach of the court of appeals discriminates against the poor, the forgetful and the trusting because they cannot afford, do not remember, or choose not, to lock their doors: the Fourth Amendment right to privacy, runs the argument, should apply to every group and should not depend on the fortuity of a locked door. *Amicus* Ohio Br. 12. The short answer to this argument is that the right of privacy does belong to all groups, but the officers' and the residents' interest in safety is different in the case of a locked door and an unlocked door. As shown above, the breaking of a door (or window) greatly magnifies the chances that a resident will act in self defense, thereby jeopardizing the safety of both the officers and the occupants.

3. Damage To Property Bears On The Decision Whether To Make An Unannounced Entry As Well As The Manner Of Entry.

The government argues that damage to property implicates only the manner in which the unannounced entry is made, not the initial decision whether to enter. Gov. Br. 24 n.9. In a related argument, *Amicus* Ohio asserts that the approach of the court of appeals establishes an unprecedented "multi-exigency" requirement. Under this approach, argues *Amicus*, the officers must first establish exigent circumstances to make an announced entry, and, second, additional exigent circumstances to justify the manner of entry if that includes the destruction of property. *Amicus* Ohio Br., *passim*.

The government and *amicus* misapprehend the approach of the court of appeals. The court asks a single question: under the totality of circumstances, was the decision to make a no-knock entry *by breaking the garage window* reasonable? The Ninth Circuit answered this question in the negative.[31] The attempt by the government to divorce the reasonableness of the decision to make an unannounced entry from the manner of entry makes is not persuasive. First, the government concedes that "the reasonableness of a [police action] depends not only on when it is made, but also on how it is carried out."[32] Furthermore, in *Wilson*, the Court held that, as a matter of constitutional law, "the method of an officer's entry into a dwelling" was among the factors to be considered

---

[31] The Ninth Circuit's use of the specific terminology "mild exigency" or "more specific inferences of exigency" does not constitute a different, "two-tiered" test, as the government claims. This terminology is simply the court's means of distinguishing among the kinds of exigencies that exist – in this case, the kind and degree of danger that Shelby realistically presented to the officers when viewed from the perspective of a reasonable officer under the totality of the surrounding circumstances.

[32] Gov. Br. 24 n.9 (quoting *Graham v. Connor*, 490 U.S. at 395); *see Tennessee v. Garner*, 471 U.S. at 8 (court rejects state's argument that, where the police killed a suspected burglar after he refused to halt, the Fourth Amendment had nothing to say about how the seizure was made).

in assessing the reasonableness of a search and seizure. *Wilson*, 514 U.S. at 934.

Second, the decision to break the garage window here was an inseparable part of the decision to make an unannounced entry. No new facts arose on the scene. The officers did not decide first to make an unannounced entry, and only then consider the manner of such entry. The plan for the execution of the warrant provided that one SWAT team "would be responsible for securing the garage area of the residence *through* the East side window." Pet. App. 44a (emphasis added). Thus, the officers made one decision: entry was to be made *by* breaking the window.

Third, the "ruse" cases demonstrate the fallacy of the government's argument that damage to property has no bearing on the decision to make an unannounced entry. Entry by ruse is approved precisely because damage to property is avoided, thereby achieving one goal of the knock-and-announce law. *See Sabbath*, 391 U.S. at 590 n.7 (ruse entries "involve[] no breaking").[33]

4. The Courts Should Not Defer To The Officers' Decision As To How Entry Should Be Made, Particularly Where No New Facts Developed At The Scene.

Respondent recognizes the weighty interest in officer safety. This does not mean, however, that the Court should, as the government urges (Gov. Br. 22), defer to the contemporaneous assessment by police of the various risks they face and the resulting choice of method of entry of a family residence, particularly where no new facts develop at the scene. The government's request runs counter to the weight of Fourth

---

[33] As recently stated by one court, a ruse entry "actually promotes both the purpose of preventing violent confrontation between the officer and the surprised occupant and *that of preventing unnecessary property damage*." *State v. Dixon*, 924 P.2d 181, 190 (Haw. 1996) (emphasis added); *State v. Myers*, 689 P.2d 38, 42 (Wash. 1984).

Amendment law and this Court's recent pronouncement in *Richards* that "it is the duty of a court confronted with the question to determine whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement." *Richards*, 117 S. Ct. at 1421.

Deference is also not desirable because the law recognizes that law enforcement officers are engaged in the "competitive enterprise of ferreting out crime" and thus are hardly "neutral" in the manner in which they exercise their discretion and judgment. *See Johnson v. United States*, 333 U.S. 10, 13-14 (1948). At best, the officers "may lack sufficient objectivity to weigh correctly the strength of the evidence supporting the contemplated action against the individual's interest in protecting his own liberty and the privacy of his home." *Steagald v. United States*, 451 U.S. 204, 212 (1981). At worst, they may be highly anxious and excited before executing a warrant involving the forced entry into a family residence at night. In such circumstances, the judgment of officers as to what is in their best interests, not to mention the interests of others, is bound to be clouded. *See United States v. Lefkowitz*, 285 U.S. 452, 464 (1932) (questioning the "caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime").

The government argues that officers must often make "split-second" judgments in the field, and suggests that such judgments should not be second-guessed by armchair judges. Gov. Br. 22. This argument diminishes the separation of powers principle and has been rejected before in numerous contexts. *See, e.g., Graham*, 490 U.S. at 396-97 (even though police "often forced to make split-second judgments" as regards to amount of force used to make arrest, decision still subject to "reasonableness" test). To be sure, judicial review must take into account the pressures and time restrictions under which officers sometimes operate. *Id.* This does not mean, however, that police conduct is free from judicial

scrutiny. *Id*; *see Terry*, 392 U.S. at 29, 30 (a frisk must "be confined in scope" and "carefully limited").[34]

In any event, in the instant case, there was no necessity for any "split second" decision making at all. The warrant was applied for and issued on November 4, and the officers chose the date and time for its execution. The officers had ample time to assemble forty-five officers and to formulate a detailed plan regarding the execution of the warrant. *See* Pet. App. 44a (detailing assignments of the SWAT teams); *see Stewart*, 867 F.2d at 585 ("[i]t is difficult to understand how the circumstances were 'exigent' when the officers had an entire day to formulate a response to [the] circumstances."). Importantly, no new facts developed at the scene which required the exercise of "split-second" judgment calls.[35]

---

[34] While police are not required "to take unnecessary risks in the performance of their duties," *Terry*, 392 U.S. at 23, they are expected to take *necessary* risks. This is an inherent part of police work. The fact is that the police are always at risk and make frequent split-second decisions in all aspects of their work.

[35] The government and *Amicus* AELE rely on *Dalia v. United States*, 441 U.S. 238 (1979), for the proposition that the method used in executing a warrant is generally left to the discretion of the officers. Gov. Br. 17, *Amicus* AELE 3. This reliance is misplaced for several reasons. First, *Dalia* admonishes that the discretion is "subject of course to the general Fourth Amendment protection against unreasonable searches and seizures." *Dalia*, 441 U.S. at 257; *see Stewart*, 867 F.2d at 583 (*Dalia* does not mean that discretion is "without limitation" as the action taken "must be within statutory and constitutional limitations").

Second, the government raised the same argument in its *amicus* brief in *Richards*. *See* Gov. *Amicus* Br., 1997 WL 106423 at 54-55. The Court implicitly rejected the argument by making clear that reviewing courts must engage in a case-by-case reasonableness analysis of the execution of the warrant. *Richards*, 117 S. Ct. at 1421.

Finally, as LaFave points out, the *Dalia* holding – that a wiretap warrant did not specifically have to authorize covert entry to install such a device – was grounded in two considerations: "(i) such entry is necessary for virtually every wiretap, so specific authorization would be an 'empty formalism'; and (ii) covert entry does not involve destruction of property or

5. The Court Properly Required A Showing Of Specific Evidence Of Danger To The Officers.

The government argues that it is unreasonable to demand specific information as to dangerousness because such evidence is "ordinarily unavailable" to officers. Gov. Br. 21. This argument is wrong for two reasons. First, the "demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Terry*, 392 U.S. at 21 n.18.[36]

Second, the long history of government success in the Ninth Circuit under the approach that it now attacks belies the assertion that specific inferences of danger are ordinarily unavailable to the officers. The Ninth Circuit's cases are rife with instances of the availability of such inferences to the police.[37] Similarly, the failure of the government to complain

---

danger to persons." LaFave, *supra*, at 626. Neither reason is applicable here. On the contrary, we deal here not with the covert entry into an uninhabited office building, but with the overt, forcible breaking into an occupied family residence at night.

[36] In justifying the particular intrusion, the police officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." *Terry*, 392 U.S. at 21; *see Maryland v. Buie*, 494 U.S. 325, 334, 336-37 (1990) (specific and articulable facts must be shown to authorize protective sweep of a home); *People v. Gastelo*, 432 P.2d 706, 708 (Cal. 1967) (*en banc*) ("just as the police must have sufficiently particular reason to enter at all, so must they have some particular reason to enter in the manner chosen").

[37] *See, e.g., United States v. Hudson*, 100 F.3d 1409, 1417 (1996) (defendant recently sold drugs to informant, had prior conviction for drugs and observed with guns and drugs in bedroom), *cert. denied*, 1997 WL 593044 (Oct. 20, 1997); *United States v. Scott*, 74 F.3d 175, 176 (9th Cir.) (defendant observed with weapon in his hand), *cert. denied*, 117 S. Ct. 131 (1996); *United States v. Perez*, 67 F.3d 1371, 1384 (9th Cir. 1995) (defendant "had shot and killed a suspected informant" and said he would "go down shooting"); *United States v. Von Willie*, 59 F.3d 922, 926 n.3 (9th Cir. 1995) (defendant armed and dangerous); *United States v. Reed*, 15 F.3d 928, 934 (9th Cir. 1994) (officer knew defendant likely armed and might

either to this Court or the court of appeals – over the last twenty-five years since the Ninth Circuit's approach was first announced – renders hollow the government's claim that specific inferences of danger are not ordinarily available.

6. The Approach Of The Ninth Circuit Does Not Increase The Risk Of Harm To The Police Or Unduly Burden Law Enforcement.

The government argues that the Ninth Circuit's approach is disruptive of law enforcement and "increases the risk of harm faced by officers executing warrants." Gov. Br. 20. *Amicus* AELE asserts that service of warrants "ranks among the most dangerous activity in which officers can engage" and makes the dire prediction that affirmance of the approach adopted below will "cost the lives of many police officers in the future." *Amicus* AELE Br. 7-8. The government and *amicus* offer no statistical studies whatever to support their conclusions. In fact, *Amicus* Ohio concedes that "statistics do not reveal the numbers of officers assaulted during the execution of warrants, let alone . . . in the context of the pursuit of an escaped felon." *Amicus* Ohio Br. 10. Moreover, as shown above, the exact opposite is true.

Further, the dire predictions of the government and *Amicus* are refuted by the government's unquestioned reliance upon the rule to argue that no-knock entries should be upheld, and, as the government concedes, it has "generally prevailed" under the standard. Gov. Cert. Reply Br. 2 n.1. The cases bear out this conclusion. Even in the case at bar, at the district

---

escape and slammed door in officer's face); *United States v. Turner*, 926 F.2d 883, 885 (9th Cir.) (defendant overheard to say he kept gun for use against police), *cert. denied*, 502 U.S. 830 (1991); *United States v. Ramirez*, 770 F.2d 1458, 1461 (9th Cir. 1985) (police knew that suspects in a kidnaping and murder investigation were armed and dangerous); *United States v. McShane*, 462 F.2d 5, 6 (9th Cir. 1972) (defendant armed and previously convicted of shooting at an officer); *Gilbert v. United States*, 366 F.2d 923, 929, 931 (9th Cir. 1966) (defendant armed and alleged to have killed police officer), *cert. denied*, 388 U.S. 922 (1967).

court hearing on the motion to suppress, the government praised *Becker* (which restates the Ninth Circuit approach) as *"very useful for the court . . . in stating the standard which in this case must be specific inferences of exigency to justify the breaking."* *See* Lodged Doc. B (Tr. Oral Arg. April 25, 1995 at 21). In fact, the government did not even complain about the Circuit's approach until its petition for rehearing *en banc* – after it lost the case. *See* Lodged Doc. E at 7 (Petition for Rehearing).

7. Breaking And Gunporting The Window Is Not *"De Minimis."*

The government dismisses the broken window pane and the thrusting of a firearm inside it as *"de minimis."* Gov. Br. 11, 29. In one sense, of course, it is. The replacement value of the pane cannot be much. But the government and *Amicus* miss the larger points. The breaking of the pane, together with the gunporting of the window, constituted an invasion of the sanctity and privacy of the home.[38] In this sense there can be no *de minimis* violation. For example, in *Arizona v. Hicks*, 480 U.S. 321 (1987), an officer who was lawfully inside a house was looking for stolen property and moved stereo equipment just "a few inches" to see the serial number. The state apparently argued that the movement did not constitute a search because it was trivial. This Court rejected that argument, noting that moving the object even a few inches was "much more than trivial for purposes of the Fourth Amendment." *Id.* at 325.[39]

---

[38] *See Richards*, 117 S. Ct. at 1421 n.4 (Fourth Amendment "preserve[s] that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted") (quoting *Dickerson*, 508 U.S. at 380 (Scalia, J., concurring)); *Welsh v. Wisconsin*, 466 U.S. at 748 ("it is axiomatic that the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed").

[39] *See also United States v. Karo*, 468 U.S. 705, 717 (1984) (rejecting argument that monitoring of beeper inside house is a "minuscule intrusion

Furthermore, as the instant case illustrates, the shattering of glass at night is precisely the kind of property damage that will arouse terror in sleeping residents. It was wholly foreseeable that the officers' actions here would cause Mr. Ramirez to act in defense of himself, his wife, and his three-year-old child. As Justice Harlan observed, "it is difficult to imagine a more severe invasion of privacy than the nighttime intrusion into a private home that occurred in this instance." *Jones v. United States*, 357 U.S. 493, 498 (1958) (concurring opinion); *cf.* Klaus P. Fischer, *Nazi Germany, A New History*, 392 (Continuum Press 1995) (discussing "*Kristallnacht,*" November 9, 1939, known as "The Night of the Broken Glass"); William L. Shirer, *The Rise and Fall of the Third Reich*, 430-32 (Touchstone ed. 1981) (same). The shattering of glass of the Ramirez family residence and the thrusting of the firearm inside are not *"de minimis."*

B. Even If The Courts Below Wrongly Considered Property Damage, Their Result Should Be Affirmed Because There Was Insufficient Evidence That Shelby Was On The Premises Or That He Posed An Imminent Threat To The Forty-Five Armed Agents.

The reasonableness of the officer's decision to make an unannounced entry "must be evaluated as of the time they entered [the residence]." *Richards*, 117 S. Ct. at 1422. Because of the obvious danger to the officers and occupants, before breaking into the Ramirez residence, the officers should believe more than that Shelby was "probably" in the residence. At the very least, they should have "strong reason" to believe that he was there. *See Brown*, 52 F.3d at 421; *Dorman*, 435 F.2d at 393; *cf. Maden*, 64 F.3d at 1509 (officers

---

on protected privacy interests"); *cf. Boyd v. United States*, 116 U.S. 616, 635 (1886) ("it may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure").

"knew" that defendant, a wanted fugitive, was in the apartment).

This "strong reason" was lacking. Indeed, the court of appeals had "some doubt" even as to whether Shelby was "probably" on the premises. Pet. App 12a, n.1. At the time of the entry here, as noted by the court of appeals, the officers had received no "confirmation that Shelby was on the premises." Pet. App. 10a. The "most that was known" was that he was there two or three days before the warrant was executed. Pet. App. 12a, n.1. Moreover, the last time Shelby had been "seen" was from a distance of 1,000 yards on November 3, 1995. By November 5, 1995, if Shelby had ever been there, he was likely long gone. After all, "fugitives from justice tend to be mobile" and do not remain long at one place. *Steagald*, 451 U.S. at 224 (Rehnquist, J., dissenting). Given the uncertainty of Shelby's presence, and given the obvious dangers associated with forcing entry at night by shattering glass, the officers acted unreasonably in not complying with the knock-and-announce rule.

Furthermore, even had Shelby been on the property, he would have presented little realistic threat of danger to a force of forty-five armed officers where there was no specific evidence he was armed or intent upon shooting law enforcement agents. To be sure, Shelby had a violent past, had made threats, and had several escapes. Nevertheless, the force of forty-five armed SWAT team members was more than ample to cope with any potential resistance from Shelby or any attempted escape.

The lower courts found inadequate suspicion that Shelby was *presently* armed and intended to shoot at the officers if they announced their presence.[40] The district court made a

---

[40] *See Poole v. United States*, 630 A.2d 1109, 1118 (D.C. App. 1993) (police must have reason to believe "there was a realistic possibility" that the occupant "would use the weapons against them"), *cert. denied*, 513 U.S. 855 (1994); *People v. Krueger*, 675 N.E.2d 604, 609 (Ill.1996) (officers must have "reasonable belief that a weapon will be used against them if they proceed with the ordinary announcements"), *cert. denied*, 118 S. Ct. 49 (1997); *State v. Jeter*, 634 P.2d 312, 314 (Wash. App. 1981) ("a concern for police safety must be based upon prior knowledge or direct observation that the subject of the search keeps weapons *and* that such person has a known propensity to use them"); *People v. Bennetto*, 517 P.2d 1163, 1167 (Cal. 1974) (*en banc*) (police "must reasonably believe weapon will be used against them . . . [t]his belief must be based on specific facts and not on broad, unsupported presumptions.")

specific finding on this matter: the officers had "*no information that [Shelby] was armed and dangerous at defendant's home, or that he would present any specific dangers to arresting officers if found there.*" Pet. App. 34a (emphasis added). As the Court has recently stated, "a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn therefrom by resident judges, who view such facts in light of the community's distinctive features and events. . . . " *Ornelas v. United States*, 116 S. Ct. 1657, 1663 (1996). Under this stringent standard, "if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the [reviewing court] may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 573-74 (1985).

In any event, the district court's finding is fully supported by the record. As both the district court and the court of appeals have noted, there is no evidence that Shelby had ever shot or threatened to shoot in the past, much less a police officer. The informant who supposedly saw Shelby on the property did not say that Shelby was armed or that he had threatened to shoot anyone. Nor did he say that he ever saw a gun on the property. He said that Ramirez was "supposed" to have a gun in the garage, but he provided no basis for this supposition.[41] Shelby did say in the past that he would "not

---

[41] *Cf. United States v. Stowe*, 100 F.3d 494, 499 (7th Cir. 1996) (no-knock entry lawful where informant "had personally observed the defendant at the apartment with a large amount of crack cocaine and loaded firearms"), *cert. denied*, 117 S. Ct. 1438 (1997). The case at bar sharply contrasts with *Mahomed v. The Queen*, 4 Moore 239, 247, 13 Eng.Rep.

do federal time," but this statement hardly means that he was prepared to engage in a suicidal shoot out with a small army of police.

C. The Needless Destruction Of Property Constituted A Violation Of Section 3109 And The Fourth Amendment.

The government concedes that "excessive or wholly unnecessary" destruction of property "may violate the Fourth Amendment's reasonableness standard, whether or not officers knock and announce before entry." Gov. Br. 23-24. The government's concession seriously undermines its position because, as observed by the court of appeals, Mr. Ramirez's property *was* "needlessly" damaged. Pet. App. 8a.

The government asserts that the breaking and gunporting of the garage window constituted a reasonable way "both to obtain entry and to draw the occupants to a position away from the doors," thus facilitating the officers' ability to control the search scene. Gov. Br. 26. This assertion makes no sense. By breaking the garage window, the officers would have diverted Shelby (as they did Ramirez) *to the garage*, the very place where guns were supposed to be. Moreover, in the court of appeals, the government implied the officers acted wisely in breaking the window because they were preventing the occupants from gaining access to the firearms in the garage. Lodged Doc. C at 7, Doc. D at 1-2. The government's contradictory arguments highlight the sheer speculation and Monday-night quarterbacking in which the government now engages to justify the officers' actions.[42]

293, 296 (P.C. 1843) ("[w]hile he was firing pistols at them, were they to knock at the door, and to ask him to be pleased to open it for them?").

[42] The justification of surprise is not even present here because, rather than allowing immediate control, the breaking glass alerted the sleeping residents that an invasion was afoot.

II. THE RESULT BELOW SHOULD BE AFFIRMED ON THE GROUND THAT THE KNOCK-AND-ANNOUNCE REQUIREMENT CONTAINED IN SECTION 3109 IS MORE RESTRICTIVE THAN THAT EMBODIED IN THE FOURTH AMENDMENT.

Section 3109 imposes a stricter standard than does the Fourth Amendment because the latter is governed only by the "flexible requirement of reasonableness." *Wilson*, 514 U.S. at 934. The requirements of Section 3109, by contrast, are "unqualified," *Miller*, 357 U.S. at 309, and "should not be given a grudging application." *Sabbath*, 391 U.S. at 589.[43]

A. Section 3109 Contains No Exception For Officer Safety.

This Court implied in dictum that Section 3109 may contain an officer safety exception, but it has never so held.[44] To be sure, every Circuit court that has reached the issue has held that such an exception exists.[45] None of these cases is correctly reasoned, however, because none has undertaken the appropriate statutory and historical analysis set forth below.

1. Section 3109 Explicitly Sets Forth Several Exceptions, But None For Officer Safety.

In Section 3109, Congress provided that, in executing a search warrant at a residence, an officer may force entry by breaking open a door or window in only three limited circumstances: (1) if, after notice of his authority and purpose, he is

---

[43] The result below may be affirmed on any ground which the law and the record permit. *See Schenck v. Pro-Choice Network of Western New York*, 117 S. Ct. 855, 870 n.12 (1997) (citing cases); *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982).

[44] *See supra*, n.7.

[45] *See, e.g., Gilbert v. United States*, 366 F.2d 923, 931 (9th Cir. 1966), *cert. denied*, 388 U.S. 92 (1967); *United States v. Kane*, 637 F.2d 974, 978 (3rd Cir. 1981).

refused admittance; (2) when necessary to liberate himself; or (3) when necessary to liberate a person aiding him in the execution of the warrant.[46] Conspicuously absent is any exception for officer safety. From this absence, it is reasonable to infer that Congress intended no such exception. The Court has explained:

> As in all cases involving statutory construction, our starting point must be the language employed by Congress, and we assume that the legislative purpose is expressed by the ordinary meaning of the words used. Thus, absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.

American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982) (citations and quotations omitted); *accord United States v. James*, 478 U.S. 597, 604 (1986); *United States v. Ron Pair Enterprises*, 489 U.S. 235, 242 (1989).

The language of Section 3109 is clear. The enumerated exceptions do not include apprehension of danger to the officers. Had Congress intended to create such an exception, it would have said so. *See United States v. Sims*, 231 F. Supp.

---

[46] The statute was originally enacted in two paragraphs as part of the Espionage Act of 1917, tit. XI, ch. 30 § 8-9, 40 Stat. 217, 228-29. The statute originally read as follows:

> § 8 The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance. § 9 He may break open any outer or inner door or window of a house, for the purpose of liberating a person who, having entered to aid him in the execution of the warrant, is detained therein, or when necessary for his own liberation.

In 1948 the two sections were condensed into the current 18 U.S.C. § 3109. Act of June 25, 1948, ch. 645, P.L. No. 772, 1948 U.S.C. Cong. Serv. (62 Stat. 820) 695.

251, 256-58 (D. Md. 1964) (holding that Section 3109 contains no exception for officer safety). The omission of an exception for officer safety reflects Congressional intent.[47]

2. The Legislative History Of Section 3109 Supports The Conclusion That No Officer-Safety Exception Exists.

Where, as here, the words of the statute are clear, the Court does not look to legislative history. *See Darby v. Cisneros*, 509 U.S. 137, 147 (1993) ("recourse to the legislative history . . . is unnecessary in light of the plain meaning of the statutory text"). Nevertheless, that history supports the conclusion that Section 3109 authorizes no exception for officer safety.

In the Conference Report accompanying the Espionage Act of 1917, the conferees stated that Title XI of the Act, which governs search warrants, "was based upon the New York law on this subject, and follows generally the policy of that law." Conference Report No. 65 at 20 (1917), accompanying H.R. 291, 65th Cong. 1st Sess. (1917). Apparently, in 1917, New York law contained no exception to the knock-and-announce requirement for officer safety.[48] New York

---

[47] *See Tennessee Valley Authority v. Hill*, 437 U.S. 153, 188 (1978) ("In fact, there are no exemptions in the Endangered Species Act for federal agencies, meaning that under the maxim *expressio unius est exclusio alterius*, we must presume that these were the only 'hardship cases' Congress intended to exempt"); *cf. Lindh v. Murphy*, 117 S. Ct. 2059, 2063 (1997) (because Congress expressly made Chapter 154, pertaining to capital cases applicable to pending cases, but did not make the same express provision in regards to Chapter 153, the implication is that Congress did not intend Chapter 153 to apply to pending cases).

[48] *See Phelps v. McAdoo* 94 N.Y.S. 265, 266, 47 Misc. 524, 16 N.Y. Ann. Cas. 470, 19 N.Y.Cr.R. 126 (1905) ("the law does not even permit a police officer to break into a place under a search warrant unless 'after notice of his authority and purpose he be refused admittance' (Code Cr. Proc. § 799), and it is made a criminal offense for him to do so (Penal Code, § 120)"); *cf. Bell v. Clapp*, 10 Johns R. 263, 265 (N.Y. Sup. Ct. 1813)

Criminal Code Section 799 was enacted by the Law of 1881 c.442 as part of the Field Code. The statute reads as follows:

> The officer may break open an outer or inner door or window of a building, or any part of the building, or any thing therein, to execute the warrant, if, after notice of his authority and purpose, he be refused admittance.

See N.Y. Code Crim. Proc. § 799 (McKinney 1938). It was only in 1964 that New York amended the statute to add a provision authorizing a magistrate to issue a no-knock warrant.[49] Because 18 U.S.C. § 3109 was based on New York law as of 1917, Section 3109 contains no exception for officer safety.

3. Congress Has Enacted And Repealed A "No-Knock" Law, Showing That, Had Congress Wanted To Legislate An Exception For Officer Safety, It Knew How To Do So.

The enactment of the no-knock law of 1970, short-lived as it was, makes clear that Congress knows how to legislate exceptions to the knock-and-announce principle when it wants to. The enactment and repeal of the legislation strengthens the conclusion that Section 3109 contains no exception for danger to the officer. *See Gozlon-Peretz v.*

(proper to break open door when executing search warrant where plaintiff demanded entry in "peaceable manner" and was refused). In the early 1780's, New York passed laws that authorized constables to break open the door of private homes in search of contraband alcohol, but only "if admittance shall be refused." N.Y. St. Sess.5, ch.39 s.3 (April 13, 1782), N.Y. State Laws, vol. 1 (1777-84), p. 480.

[49] *See* N.Y. Code Crim. Proc. § 799(b) (enacted by 1964 N.Y. Laws C. 85); *People v. DeLago*, 16 N.Y.2d 289 (1965) (upholding validity of the amendment), *cert. denied*, 383 U.S. 963 (1966).

United States, 498 U.S. 395, 406 (1991) (subsequent legislation has persuasive value regarding intent of earlier Congress) (quoting *Bell v. New Jersey*, 461 U.S. 773, 784 (1983)).[50]

4. The Common Law At The Time Of The Framing, Which The Statute Incorporates, Contained No Exception For Officer Safety.

The Court has suggested that Section 3109 incorporates the common law's knock-and-announce principle as well as its common law exceptions at the time of the framing of the Fourth Amendment.[51] If so, the conclusion that Section 3109 contains no exception for officer safety is strengthened, because at the time of the framing, the common law provided no such exception.

There are no indications that, before 1800, English common law "ever evolved an exception to the knock-and-announce rule based upon a reasonable apprehension of peril by the peace officer."[52] Indeed, "efforts to legislate a no-knock authorization were repeatedly resisted in the Eighteenth Century." Note, *Announcement in Police Entries*, 80 Yale L.J. 139, 144 (1970).

In this country, the knock-and-announce principle was "woven quickly into the fabric of Early American law."

---

[50] In Conference Report No. 93-1442 (1974), 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 5974, 5976, the conferees address the intent of the repealing legislation, but, apparently, only insofar as the District of Columbia. The conferrees intended that repeal return the law to that which existed before no-knock was enacted and that officers in the District follow the law applicable to other federal officers.

[51] *See Sabbath*, 391 U.S. at 591 n.8; *Wilson*, 514 U.S. 927, 930, 934-35 and n.3 (interpreting scope of knock-and-announce principle at common law "at the time of the framing").

[52] Kemal Mericli, *The Apprehension of Peril Exception to the Knock and Announce Rule – Part I*, 16 *Search And Seizure Law Report* (July 1989) at p. 132; *Ker*, 374 U.S. at 54 (Brennan J., dissenting) ("I have found no English decision [before the framing] which clearly recognizes any exception to the requirement. . . . ").

Wilson, 514 U.S. at 933.[53] Tellingly, "[e]very legal manual for American justices of the peace between 1788 and 1791 forbade unannounced, forcible entry to accomplish an arrest." W. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* (1990) at 1511 (unpublished Ph.D. dissertation, at Claremont Graduate School).[54] Furthermore, there are "no reported cases in America before 1791 discussing any exigent circumstances exception to announcement."[55]

The first time a danger-to-the-officer exception was recognized in England or America was in *Read v. Case*, 4 Conn. 166, 170 (1822). There, the court held that a plaintiff who "had resolved . . . to resist even to the shedding of blood . . . was not within the reason and spirit of the rule requiring notice." *Id.* At the time of the framing, therefore, about thirty years before *Read* was decided, the common law did not recognize an officer-safety exception to the knock-

---

[53] The Court has noted that in England there was some question as to whether the knock- and-announce principle itself was ever extended to felony arrests. *See Richards*, 514 U.S. at 935 (not "conclusive"). The Court pointed out, however, that according to the leading common law commentators, Hawkins and Hale, there was no question that the principle extended to felony arrests. *Id.* at 932; *see* Note, *No-Knock and the Constitution*, 55 Minn. Law. Rev. 871, 876 (1971) ("exceptions to the *Semayne* rule of announcement were not recognized by early English text writers").

[54] Justice O'Connor has described Cuddihy's dissertation as "one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken." *Vernonia School District 47J v. Acton*, 115 S. Ct. 2386, 2398 (1995) (dissenting opinion); *see also* Morgan Cloud, *Searching Through History; Searching For History*, 63 U. Chi. L. Rev. 1707, 1710, 1746 (Fall 1996) (the dissertation is "the most ambitious history of the Fourth Amendment's origins yet undertaken by a professional historian" and it "serves as a model of the effort and objectivity that are hallmarks of legal history").

[55] Robert Driscoll, *Unannounced Police Entries and Destruction of Evidence After Wilson v. Arkansas*, 29 Colum. J.L. & Soc. Probs.1, 26 (Fall 1995); Note, *Announcement in Police Entries*, 80 Yale L.J. 139, 144 (1970).

and-announce principle. Therefore, Section 3109 contains no such exception.

5. Congress Determined That Strict Compliance With The Statute Best Promotes The Safety Of The Officers And The Occupants.

Although Congress did not enact an exception for officer safety, by enacting the statute as it is, Congress *did* provide for officer safety. Recognizing that deaths to officers and occupants can occur whether or not there is an announcement of identity and purpose, Congress balanced the various risks, considered the experience of the common law, and determined that compliance with Section 3109 best protects the safety of the occupants and officers alike. This judgment is entirely reasonable. The common law and this Court have always insisted that compliance with the knock-and-announce rule safeguards the police as much as the occupants of the residence. *Supra*, at 19-22.

6. The Circuit Courts Have Erroneously Rewritten The Statute.

The circuit courts erred in creating an officer-safety exception because they did not undertake the analysis set forth in Sections 1-5 above. By judicially creating an officer-safety exception, the circuit courts have rewritten the statute as they deem it "should" read. Courts, however, "are not authorized to rewrite a statute because they might deem its effects susceptible of improvement." *Badaracco v. Commissioner of Internal Revenue*, 464 U.S. 386, 398 (1984). Nor may a court interpret a statute "to reach what [the court] perceive[s] – or even what [the court] thinks a reasonable person should perceive – is a 'sensible result.'" *Bifulco v. United States*, 447 U.S. 381, 401 (1980) (Burger, C.J., concurring). Rather, "[c]ourts must presume that a legislature says in a statute what it means and means in a statute what it says." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Therefore, "Congress must be taken at its word unless [the Court is] to assume the role of statute

revisers." *Bifulco*, 447 U.S. at 401.[56] In sum, Section 3109 contains no exception for danger to the officer.

B. Even If Section 3109 Contains An Exception For Officer Safety, The Exception Should Only Apply When The Officers Have A Reasonable Belief That Compliance With The Knock-And-Announce Rule Presents An "Imminent" Danger To Their Safety

Even if Section 3109 contains an exception for officer safety, the Court should construe the exception more restrictively than that embodied in the Fourth Amendment.[57] The Court should adopt the "imminent peril of bodily harm" standard to which the FBI adheres.[58] This standard was

---

[56] *See also Tennessee Valley*, 437 U.S. at 194 (where "Congress has spoken in the plainest of words . . . our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by Congress is to be put aside"); *Morse v. Republican Party of Virginia*, 116 S. Ct. 1186, 1234 n.18 (1996) (Thomas J., dissenting) ("we are not free to construe statutes by wondering about what Congress 'would have wanted to enact' . . . [w]e must look to the exact text of the statute and see what Congress has in fact, and not in theory, enacted").

[57] *See United States v. Moore*, 956 F.2d 843, 847 (8th Cir. 1992) (Section 3109 described as "more restrictive than the Fourth Amendment"); *United States v. Stiver*, 9 F.3d 298, 301-02 (3rd Cir. 1993) ("some conduct authorized by Section 3109 may nonetheless violate the Constitution; conversely, some conduct permissible under the Constitution may be barred by Section 3109."), *cert. denied*, 114 S. Ct. 1115 (1994); *United States v. Sagaribay*, 982 F.2d 906, 910 (5th Cir.) (although search by state officers under state warrant may have violated Section 3109, search was reasonable under Fourth Amendment), *cert. denied*, 114 S. Ct. 160 (1993). Under Section 3109 the government bears the burden of establishing that the officer's unannounced entry falls within an exception to the knock-and-announce rule. *Maden*, 64 F.3d at 1505; *United States v. Phelps*, 490 F.2d 644, 645 (9th Cir. 1974), *cert. denied*, 419 U.S. 836 (1976).

[58] According to the *amicus* brief filed by the United States on behalf of the respondent in *Richards*, federal agents "virtually always" announce

enunciated in *Read v. Case*, 4 Conn. at 170, the first case to establish the officer safety exception at common law.[59] Under this standard, the result below should be affirmed: for the reasons set forth above, Shelby did not pose an imminent peril to the officers.

III. THE RESULT BELOW SHOULD BE AFFIRMED BECAUSE THE MAGISTRATE HAD NO AUTHORITY TO ISSUE A NO-KNOCK WARRANT, AND, THEREFORE, THE WARRANT WAS VOID *AB INITIO*

As shown above, in 1970, Congress authorized magistrates and judges to issue no-knock warrants in limited circumstances, but Congress repealed this authority in 1974. Therefore, when the Magistrate-Judge issued a no-knock warrant in the instant case, he had no authority to do so. As a consequence, the warrant was void *ab initio*. *Cf. Gomez v. United States*, 490 U.S. 858, 872-76 (1989) (where Congress did not authorize magistrates to select jury over objection, conviction void regardless of lack of prejudice); *Bingman v. Ward*, 100 F.3d 653, 658 (9th Cir. 1996) (because magistrate

---

their presence and purpose when executing a search warrant. Gov. *Amicus* Br. (*Richards*) 29 n.3, 1997 WL 106423. The FBI does not comply with the rule only in those cases where the officer reasonably believes that the announcement would place himself or other persons within the premises "in imminent peril of bodily harm." *Id.* (citing FBI Legal Handbook for Special Agents Sec. 5-2.2.2, 5-2.2.3(1) (1994)).

[59] *See United States v. Rivera*, 928 F.2d 592, 606 (2d Cir. 1991) (no-knock entry proper only if "imminent danger" of bodily harm to persons inside); *State v. Stevens*, 511 N.W. 2d 591, 600 n.1 (Wis. 1994) (Abrahamson, J., concurring) (no-knock proper if "imminent danger" to officer), *cert. denied*, 515 U.S. 1102 (1995); *cf. Ker*, 374 U.S. at 47 (Brennan, J., dissenting) (one exception to knock-and-announce rule exists when persons within residence are in "imminent peril of bodily harm."); *see also* Goddard, *supra*, 75 B.U.L.Rev. at 460 (discussing "imminent danger" standard).

may not "undertake the exercise of an authority which Congress has expressly withheld," contempt order vacated), *cert. denied*, 117 S. Ct. 1473 (1997).[60]

CONCLUSION

The danger to the officers in the instant case arose not from Shelby, who was not on the premises, but rather from the officers' unreasonable failure to comply with the simple and ancient requirement that the officers "ought to signify the cause of their coming, and to make request to open doors." The Court should affirm the result below.

RESPECTFULLY SUBMITTED November, 1997.

/s/ Michael R. Levine
MICHAEL R. LEVINE
Attorney for Respondent

---

[60] Mr. Ramirez raised this argument in the district court, but the court did not address it. *See* Motion to Suppress, Dist. Ct. Docket No. 20, filed with this Court on November 5, 1997, styled "Lodged Document I in Support of Respondent's Brief on Writ of Certiorari." In the court of appeals, the government argued that the "no-knock" clause in the warrant supported the conclusion that the executing officers relied in good faith on the warrant. *See* Lodged Doc. C at 13. In his brief, Mr. Ramirez answered that the officers were not acting in good faith because they persuaded the magistrate to undertake an unlawful act: namely, issuing an unauthorized "no-knock" warrant. *See* Ramirez Brief on Appeal to the Ninth Circuit Court of Appeals at 8-9, lodged with the Court on November 5, 1997, styled "Lodged Document J in Support of Respondent's Brief on Writ of Certiorari." Mr. Ramirez did not, however, raise the instant argument as a separate ground for affirmance of the judgment.